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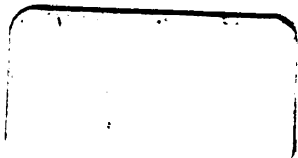


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REPORTS
OF
CASES
ARGUED AND DETERMINED
IN THE
SUPREME JUDICIAL COURT
OF
MASSACHUSETTS.

By THERON METCALF

VOLUME V.

BOSTON:
LITTLE, BROWN AND COMPANY.
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JUDGES
OF THE
SUPREME JUDICIAL COURT

DURING THE TIME OF THESE REPORTS.

HON. LEMUEL SHAW, CHIEF JUSTICE.
HON. SAMUEL S. WILDE, }
HON. CHARLES A. DEWEY, } **JUSTICES.**
HON. SAMUEL HUBBARD, }

ATTORNEY GENERAL.
HON. JAMES T. AUSTIN.

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CASES
ARGUED AND DETERMINED
IN THE
SUPREME JUDICIAL COURT
FOR THE
COUNTY OF MIDDLESEX, OCTOBER TERM 1842,
AT CAMBRIDGE.

PRESENT:

HON. LEMUEL SHAW, CHIEF JUSTICE.
HON. SAMUEL S. WILDE, }
HON. CHARLES A. DEWEY, } JUSTICES.
HON. SAMUEL HUBBARD, }

MARTHA D. EWER *vs.* ERENEZER HOBBS, Jr., & wife.

A debtor made three mortgage deeds, at the same time, of the same land, to secure payment of different sums, on the same day, to three of his creditors: The deeds were recorded at the same time, and no preference or priority was intended by the parties: The mortgagor subsequently made partial payments, in different proportions, to each of the mortgagees; and after condition broken, he surrendered possession of the land to each of them, on the same day, who entered for foreclosure: One of the mortgagees thereupon filed a petition against the others for partition of the land. *Held*, that although the mortgagees were tenants in common in proportion to the amount of the balance of their several debts, yet that, until foreclosure, their estate in the land was not the subject of partition.

PETITION FOR PARTITION. The parties agreed upon the following facts: On the 24th of October 1831, Samuel G. Derby, being seized of the several parcels of land described in said petition, conveyed the same, by three mortgage deeds, to Martha Derby, now Martha D. Ewer, the petitioner, to Mary Hobbs, wife of said E. Hobbs, jr., and to Joseph O. Derby, to secure payment of three notes made by him on the same day, and each payable in one year, with interest; viz. a note to said Martha for \$3400, to said Mary for \$905, and to said Joseph

O. for \$3400. These deeds were made, delivered and registered, simultaneously, and no preference or priority of one to either of the others was intended by the parties thereto. On the 11th of March 1833, said Joseph O. assigned his said note and mortgage to said E. Hobbs, jr. On the 20th of February 1841, said Samuel G. Derby delivered possession of the mortgaged premises to the petitioner, and to said E. Hobbs, jr., in right of his wife, and as assignee of said Joseph O., for breach of the conditions of said three mortgage deeds, and for the purpose of foreclosure. When possession was thus delivered, there was due on the aforesaid note to the petitioner \$3262, on the aforesaid note to Mary Hobbs \$1411, and on the aforesaid note to Joseph O. Derby \$5052 — several payments of principal and interest having been previously made.

The parties agreed that judgment should be rendered for such partition as the court should order, and that commissioners should be appointed to make the same.

The argument was had at the last October term.

H. H. Fuller, for the petitioner.

I. Fiske, for the respondents.

SHAW, C. J. [After stating the facts.] The question argued at the bar is, in what proportions the parties are entitled to the estate. At the time of the execution of the three mortgages, each mortgagee had notice of the two others, which were made simultaneously and were recorded at the same time; and it is not insisted that either has any priority or preference over the other. Entry to foreclose was made, and possession surrendered to both by the mortgagor, at the same time; 20th February 1841.

The case seems to have been argued on both sides, as if it were a matter of course, that by law partition can now be made between these parties; and the only struggle has been, to determine the relative proportions in which they shall respectively take. But the objections, which each party has made to the proportion proposed by the other, have led us to the consideration of a previous question, whether the parties are now in a condition to have partition. In order to decide this question, it

becomes necessary to consider what are the relative rights of these parties, as mortgagees, under the general principles of the law of mortgage, as held and administered in this Commonwealth, and the particular situation in which they stand, under the facts presented by the present case.

The first great object of a mortgage is, in the form of a conveyance in fee, to give to the mortgagee an effectual security, by the pledge or hypothecation of real estate, for the payment of a debt, or the performance of some other obligation. The next is, to leave to the mortgagor, and to purchasers, creditors, and all others claiming derivatively through him, the full and entire control, disposition and ownership of the estate, subject only to the first purpose, that of securing the mortgagee. Hence it is, that, as between mortgagor and mortgagee, the mortgage is to be regarded as a conveyance in fee ; because that construction best secures him in his remedy and his ultimate right to the estate, and to its incidents, the rents and profits. But in all other respects, until foreclosure, when the mortgagee becomes the absolute owner, the mortgage is deemed to be a lien or charge, subject to which the estate may be conveyed, attached, and in other respects dealt with, as the estate of the mortgagor. And all the statutes upon the subject are to be so construed ; and all rules of law, whether administered in law, or in equity, are to be so applied, as to carry these objects into effect. In an early case in Massachusetts, it was held by Chief Justice Parsons, that where a mortgage was made to partners, in such form as would ordinarily create a tenancy in common in other grantees—inasmuch as it was designed to secure a joint debt, which, in case of the decease of one partner, would vest in the survivor for the purpose of collection, and subject to the partnership debts—the estate should be held to be a joint tenancy, in order that by the principle of survivorship, applicable to that tenure, the real security might accompany the debt. *Appleton v. Boyd*, 7 Mass. 131. This doctrine was earnestly opposed by Mr. Justice Story, in the case of *Randall v. Phillips*, 3 Mason, 378, who insisted that such mortgage, so far as it operated as a transfer of the legal estate, was to be construed a

tenancy in common, and not a joint tenancy. But at the same time he maintained, that on the death of one partner, the heirs of the deceased would take a moiety, charged with an implied trust to hold for the survivor, as security for the debt. And in *Goodwin v. Richardson*, 11 Mass. 469, the opinion of the court, given by Mr. Justice Jackson, was, that although a mortgage to partners, to secure a joint debt, might be deemed a joint tenancy, until foreclosure, yet the new absolute estate, vested in the mortgagees by foreclosure, was to be considered as a tenancy in common. It seems, therefore, that whatever difference of opinion there may seem to be, among our eminent jurists, on this subject, is a difference as to the technical mode of the operation of the conveyance ; but they all concur in the proposition, that it is to be so construed, as most effectually to form an indissoluble connexion between the estate and the debt, and make the land subject to the debt, in whatever legal form it may pass, or into whose hands soever it may come. In a recent case, in pursuance of the same general object, it was held, that a mortgage to four, to secure several debts, was to be deemed a tenancy in common, and not a joint tenancy. *Burnett v. Pratt*, 22 Pick. 556.

But it becomes necessary to consider precisely what the conveyances were, under which these parties respectively claim. It was not a mortgage to the three, either as tenants in common or joint tenants, to secure their several debts of unequal amount. Nor was it a conveyance to each, of an undivided third, or their aliquot part of the estate, to secure to each his proper debt. But it was a mortgage of the entire estate to each, subject only to the incumbrance created by the mortgage made to the other two at the same time. If one should be paid off in full, then, as in the ordinary case of a mortgage subject to a prior incumbrance, the estate would stand charged with the whole of the subsequent mortgages, as if the previous one had not been made. So if it had been paid in part, or if two had been paid off in full, the estate would be bound for the payment of the whole of the remaining mortgages or mortgage. It is manifest, therefore, that it would not accomplish the original intentions of the parties,

to divide this estate into three equal parts, and consider each mortgagee as taking one third ; because, whilst one debt might be wholly paid off by the mortgagor, the others might accumulate by the accruing of interest. If the latter could take one third only, it might be wholly insufficient to secure the increased debt, whilst one third would be wholly discharged, and revert to the mortgagor ; which would be contrary alike to the plain intent and to the legal effect of the mortgage, binding the whole estate for each debt, subject only to the prior incumbrances.

Nor can these proportions become fixed, until the actual foreclosure of the mortgage. Until that time, the mortgagor may redeem ; so that neither of the present parties will hold anything in the estate. Or one may be paid in full, either voluntarily by the mortgagor, or by satisfaction out of other funds, and then the other will hold the whole ; or a part may be paid, and then the proportions will be varied. There seems therefore to be an insuperable objection to making partition, whilst persons hold as mortgagees only, before foreclosure.

To corroborate this view, it seems proper to recur to a class of cases settling a principle, by which the rights of mortgagors and mortgagees, before foreclosure, are regulated. Before foreclosure, the estate is, to most purposes, in the mortgagor ; he may redeem and make it his own, by paying the debt or performing such other condition as it was intended to secure. The entry to foreclose is a mere step in the process towards a legal foreclosure, and the estate does not therefore cease to be a pledge for the security of the debt. An entry to take the rents does not affect the right to redeem. It merely adds to the fund pledged for the security of the debt. Until foreclosure, the interest of the mortgagee, as well after as before entry to take the rents and profits or to foreclose, is rather a right to acquire an estate in the land, than an actual estate. When the foreclosure does take effect, the mortgaged premises become the absolute estate of the mortgagee ; it is thenceforth indefeasible, and pays the debt or debts for which it was mortgaged, in full, if of sufficient value, otherwise *pro tanto*, in the proportion which its actual value bears to the amount of the debt. The

*

Ewer v. Hobbs & wife.

estate is acquired at that time, although it relates back to the time of giving the mortgage ; as an estate acquired by levy of execution relates back to the time of attachment on mesne process, (if there was one,) to avoid mesne incumbrances. This view was taken of the law, in the case of *Goodwin v. Richardson*, 11 Mass. 469, before cited, in which it was held, that although the mortgage to partners, in the first instance, constituted a joint right for the purposes of remedy, yet the estate, afterwards acquired by actual foreclosure, was a tenancy in common. In *Smith v. Dyer*, 16 Mass. 18, it was held, that as well after entry as before, but before foreclosure, the mortgage is to be deemed a security for the debt, and not an estate ; that it goes to the executor, and not the heir ; and that the heir cannot maintain a real action on the mortgage. In *Dewey v. Van Deusen*, 4 Pick. 19, this was reconsidered and confirmed, in a case where the mortgagee had entered for condition broken.

The same general principle is supported by another class of cases. Before the revised statutes went into operation, the law was well settled, that no real estate, which a testator acquired after the execution of his will, passed by the will. Under this rule, it was held, that real estate, of which the testator had a mortgage at the time of making his will, but which was foreclosed before his death, was acquired by the foreclosure, and not by the anterior deed, and so did not pass by the will. *Ballard v. Carter*, 5 Pick. 112. *Fay v. Cheney*, 14 Pick. 401. In this last case, it was put distinctly upon the ground, that it is the foreclosure, by which the pledge is changed into an indefeasible estate. The same doctrine is again considered and reaffirmed in the case of *Brigham v. Winchester*, 1 Met. 390.

Such being the nature of the right which mortgagees have in mortgaged lands, before foreclosure — a defeasible, redeemable, and fluctuating interest — we are of opinion, that when such right or interest is held by two or more persons, as joint tenants or tenants in common, they do not hold such an estate as can be the subject of partition. Rev. Sts. c. 103, § 1, 3, 4. The statute on this subject of partition does not contain any express limitation, but we think it results from the several provisions

taken together, from the obvious purposes of the process of partition, and from the nature of the interest of such mortgagees. In an analogous case, it has long been held, that such mortgagees, though in actual possession, have no interest which can be reached by attachment. And although mortgagees, after entry, are in the receipt of the rents and profits, it is not, strictly speaking, in their own right, but only as factors for the mortgagor, and liable to account for them, in case of redemption.

But without deciding that in no case will a petition for partition lie, between joint tenants or tenants in common holding under a mortgage not foreclosed, we are of opinion that in the present case, the facts of which are peculiar, such petition cannot be maintained. Here the parties hold under two distinct mortgages, each for the whole estate, and each subject to the other; here both entered to foreclose, after condition broken, and with the consent of the mortgagor, at the same time; and, unless redeemed, all will be foreclosed at the same time.

If it be asked, what is to be the condition of the mortgaged premises in the mean time, we think the question is not one of much difficulty. As tenants in common, neither can enter or hold to the exclusion of the other; but the possession of one enures to the benefit of himself and his cotenant. If one take more than his share of the rents and profits, a bill in equity or an action of assumpsit, in nature of an action of account, will lie, to recover the just share. Rev. Sts. c. 118, § 43. The rents and profits are first to be appropriated to the payment of interest accruing whilst the mortgaged premises are so held, and it seems, therefore, would be appropriated to the respective mortgages, in proportion to the interest accruing at the same time on their respective debts; if it exceeds that amount, then to reduce the debts *pro ratâ*.

Perhaps it is hardly necessary to anticipate the question, how the estate is to be divided in case there should be a foreclosure, and some part of the several mortgages should remain unpaid, but it may perhaps be proper to follow out the view laid down, by indicating what would seem to be the result, according to

Dana & others v. Valentine.

the principles before stated. If the estate, at the time of foreclosure, is sufficient to pay the balance of all the mortgage debts then due, the result is obvious; the debts will be fully paid, and each tenant in common will have such share in partition, as his debt then due bears to the aggregate of the mortgage debts. And this must be ascertained by a just appraisement. If it is not equal in value to the whole amount of debts then remaining due, the tenants in common must divide the land in the proportion that each debt respectively bears to the aggregate of debts. This results from the great principle of equity, that where two or more are entitled to payment out of a common fund insufficient to pay the whole, and neither has any ground of preference over the other, by priority of contract or otherwise, each must receive in proportion to his just claim on the fund.

Petition dismissed.

RICHARD H. DANA & others vs. CHARLES VALENTINE.

An owner of vacant land, which is intended for house lots, is not entitled to an injunction to restrain the exercise of an offensive trade in the vicinity thereof, where by its value is diminished. Such owner has a complete and adequate remedy at law for the injury so caused.

Though a party is entitled, upon a bill in equity, to an injunction to restrain the exercise of an offensive trade so near to his dwellinghouse as to be a nuisance to him, yet if it be doubtful, on the evidence, whether he who causes the nuisance has not a prescriptive right to exercise the trade there, the court will not issue such injunction, until the party complaining has established his right to redress, in a suit at law. And the court, in such case, will not suspend the proceedings on the bill, until a trial of the right at law, and issue a temporary injunction, to restrain the defendant in the mean time, unless there is danger of irreparable damage to the plaintiff.

Where a party exercises an offensive trade in the same place for more than twenty years, with no molestation or interruption, except a suspension thereof for two years before the twenty years elapse, he does not, by such suspension, lose his right, unless it appears that he intended to abandon and not resume the exercise of such trade.

Where several plaintiffs unite in a bill praying for an injunction, and only part of them show a title to relief, the court is authorized, by the Rev. Sts. c. 100, § 22, to allow an amendment of the bill, by striking out part of the plaintiffs, even after issue joined and evidence published.

THIS was a bill in equity, brought by ten plaintiffs, praying for an injunction to restrain the defendant from carrying on the business of manufacturing soap and candles, and of slaughtering cattle, &c., in the town of Cambridge.

The bill alleged that six of the plaintiffs were, and long had been, severally seized and in the actual possession of freehold estates in several parcels of land in said Cambridge, fronting on Pearl Street, in the immediate vicinity of a dense and rapidly increasing population ; which lands would be of great value and in great demand for dwellinghouses, but for the existence of the nuisances hereinafter complained of, and were of comparatively small value for any other purpose than for building lots : That the other four plaintiffs were, and long had been, severally seized and possessed of dwellinghouses in said Cambridge, near to said street, which were severally occupied and inhabited by them, with their several families : That the defendant, for five years next before the filing of the bill, had been, and still was, possessed of a lot of land and buildings, fronting on said street, contiguous and near to the aforesaid lands and dwellinghouses of the plaintiffs ; and that he, about five years since, commenced and has ever since wrongfully exercised and carried on, in and upon his said lot of land and buildings, the trade and business of manufacturing soap and candles, and of slaughtering cattle, and of melting and trying out grease and manufacturing tallow, from the bones and offal of cattle, whereby the air, within and about the beforementioned dwellings and lands of the plaintiffs, had constantly been, and still was, impregnated with noisome, noxious and offensive vapors, fumes and stench, and had been, during all the time aforesaid, and still was, by means thereof, rendered corrupt, offensive and unwholesome . That the aforesaid lands of two of the six plaintiffs first above-mentioned had been, during the time aforesaid, and still were, flowed and injured by the feculent matter proceeding from the defendant's slaughter house on his said lot of land : That the said lands of all the plaintiffs had been, and still were, by reason of the said trades so injuriously exercised by the defendant, rendered unsaleable and of no value ; and that the plaintiffs,

who own the dwellinghouses abovementioned, and their families, had been and still were greatly harassed and annoyed, their health endangered, and their dwellings rendered uncomfortable and unfit for habitation. The bill further alleged, that the defendant, in the exercise of his business of slaughtering cattle, and as incident thereto, greatly annoyed and injured the plaintiffs, who are last abovementioned, and their families, by filling said street with herds of cattle, and thereby often rendering it impassable with safety or comfort; and also by spreading upon the fences, on both sides of said street, the hides taken from slaughtered cattle, and thereby filling the air with noxious stench-
es, &c.

It was further alleged in the bill, that within two months next before the filing thereof, the defendant's buildings, in which he exercised said trades, were consumed by fire, and that the plaintiffs had requested him to refrain from rebuilding and from carrying on said trades any longer in that place; but that the defendant had refused so to refrain, and had avowed his determination to rebuild, and to carry on said trades as before, and had begun and was proceeding in the erection of buildings, &c., for that purpose.

The bill concluded with an averment that the plaintiffs had no plain, adequate and complete remedy at law, and a prayer that a writ of injunction might be ordered and issued against the defendant, to desist from recommencing either of said trades in the place or vicinity aforesaid, and that he might be decreed to pay to the plaintiffs, respectively, the damages sustained by them, by reason of his former wrongful exercise of said trades.

The defendant's *answer* admitted, that in the year 1825 he became the occupant of the lot of land and buildings mentioned in the plaintiffs' bill, and that in 1828 he became the owner thereof in fee, and had, from his first occupation thereof, there carried on the business of slaughtering cattle, and boiling and trying out tallow, and for the last five years had been there engaged in manufacturing soap and candles; but he denied that the air within and about the premises of the plaintiffs had been thereby constantly, or during any part of said five years, im-

pregnated with noisome or unwholesome vapors, so as to render the same offensive or injurious to the plaintiffs or their families, or that the lands of either of the plaintiffs had ever been flowed or injured by the feculent matter proceeding from the defendant's slaughter house. The defendant also denied that either of the plaintiffs, or their families, had suffered any great annoyance or injury, or been rendered greatly uncomfortable by any of the causes set forth in their bill: He admitted, however, that during part of the hot season of some years, prior to 1836, disgusting and offensive vapors, fumes, &c., did proceed from the matter which accumulated about his slaughter house, whereby the air on the plaintiffs' premises might have been and probably was a little corrupted, and rendered a little offensive and uncomfortable; but denied that such was the fact since the year 1835.

The defendant also averred, in his answer, that Wheeler and Gay, from whom, through mesne conveyances, he derived title to his said lot of land, &c., purchased said lot in the year 1816, and in that year erected thereon buildings, &c., suitable for the purpose of slaughtering cattle, and ever thereafter, for seven years next ensuing, there carried on the business of slaughtering cattle and boiling and trying out tallow; and that the same business was afterwards there carried on by others, excepting two years, until the year 1825, when the defendant became the occupant of said lot and buildings, as above by him stated.

The plaintiffs filed a general *replication*, and evidence was taken by both parties.

The argument was had at the last October term.

Greenleaf & R. H. Dana, Jr., for the plaintiffs.

Buttrick, for the defendant.

WILDE, J. [After stating the substance of the bill and answer.] The material facts alleged in the bill are satisfactorily proved. Indeed most of them are admitted in the answer. The charge, however, as to the *unwholesomeness* of the air is neither admitted by the defendant, nor satisfactorily proved by the plaintiffs. But according to the view we have taken of the question, whether, upon the whole matter, the plaintiffs are entitled to the relief prayed for, we do not consider it necessary

to discuss the conflicting evidence on this point, nor that in respect to the extent of the plaintiffs' damages, about which the numerous witnesses do not entirely coincide.

The facts admitted by the answer are abundantly sufficient to entitle the plaintiffs to relief, either jointly or severally, unless the defendant can show a sufficient defence. Two grounds of defence are relied on. The first is, that the plaintiffs, if they have been injured, have a complete and adequate remedy at law. And in the second place, that the defendant has made out a good prescriptive right and justification.

As to the first ground of defence, we are of opinion, that the several plaintiffs, who own vacant lots, on which there are no dwellinghouses, have a complete and adequate remedy at law, and that an action at law for the recovery of damages for the diminution of the value of their lands, by the nuisance alleged, is the only suitable and appropriate remedy. Upon no principle of equity can the court interpose in their favor, by injunction on the defendant to desist from carrying on his trade; there being no certainty that dwellinghouses will ever be erected on these premises: Or if there should be, it is uncertain when such erections may be made. To require this extraordinary relief, the injury complained of must actually exist, or the danger must appear to be certain and immediate, and not depending on any contingency. We think it therefore very manifest, that these owners of vacant lots have made out no title to the interposition of a court of equity. *Attorney General v. Nichol*, 16 Ves. 342. *Fishmongers' Co. v. East India Co.* 1 Dick. 164. *Wynstanley v. Lee*, 2 Swanst. 336. *Bonaparte v. Camden & Amboy Rail Road Co.* 1 Bald. 231. 2 Story on Eq. § 925.

On this ground the defendant's counsel contends that the bill must be dismissed, and that by the rules of pleading and practice in courts of equity, it cannot, at this stage of the proceedings, be amended. And several cases have been cited, in which it was decided that if a party, having an interest, joins with him, as a co-plaintiff, a party having no interest, the bill is demurrable, if the facts appear on the bill, and if not, that they may be well pleaded in defence. And as to the rule of amendments, it

is well settled in the courts of equity in England, that no amendment generally is allowable, after the parties are at issue and witnesses have been examined. But there are some exceptions, when it is necessary to make new parties; which may be done by special leave of court. Story Eq. Pl. § 332. Mitf. Pl. (3d ed.) 262. *Goodwin v. Goodwin*, 3 Atk. 370. But on the question of amendments we are not bound by the English rules of practice. By our Rev. Sts. c. 100, § 22, "the court, in which any civil action is pending, may, at any time before judgment rendered therein, allow amendments, either in form or substance, of any process, pleading, or proceeding in such action, on such terms as shall be just and reasonable." Under this provision, we should not hesitate to allow an amendment of the bill on reasonable terms, if by any amendment it could be maintained.

We are therefore to consider the second ground of defence, and to determine whether either of the plaintiffs, according to the rules and principles of equity, is entitled to the relief prayed for.

The defence is, that the defendant, and those from whom he derives his title, have been in the possession of the buildings in which he carries on his trade, for more than twenty years; during which time, he and they have carried on said trade without molestation or interruption, excepting for about two years, when the said buildings were not so used by them. This, *prima facie*, is a good foundation for the presumption of a grant, unless the said *non user* is to be considered as breaking the continuity of the possession. The facts and circumstances in evidence are not sufficient to enable the court to give any decisive opinion on this point; but such as the evidence is, it is not sufficient to show any relinquishment or abandonment, by the persons under whom the defendant claims, of any of their privileges; and no interruption of their enjoyment of them by the plaintiffs is either proved or alleged. The mere ceasing to enjoy an easement does not destroy a party's right, unless it appears from the facts and circumstances that he intended to abandon and not to resume it. So it was decided in *Moore v. Rawson*, 3 Barn.

& Cres. 332. S. C. 5 Dowl. & Ryl. 234. In that case, the party's right to the easement had become perfect before he ceased to enjoy it, and in that respect it differs from the present case ; but the principle, we think, applies here. The material inquiry in all such cases is, whether there was an intention to abandon the easement or privilege before enjoyed, or whether the *non user* is imputable to some other cause. See Gale & Whatley on Easements, (Amer. ed.) 262.

Another objection to the defendant's title by prescription is, that until lately the plaintiffs suffered no damage from the alleged nuisance, and therefore could not interpose to prevent its continuance. But it is very clear that where a party's right of property is invaded, he may maintain an action for the invasion of his right, without proof of actual damage. So it was decided in *Bolivar Manuf. Co. v. Neponset Manuf. Co.* 16 Pick. 247, and the principle is unquestionable. 2 East, 161. 2 Met. 469. 4 Met. 477.

Some other objections were made to the defendant's prescriptive right, which however it is not important to remark upon, for the most that can be urged is, that the defendant's right is doubtful ; and that is sufficient for him to show, as a defence, in the present suit. It has been frequently decided that when works have been suffered to remain three years or upwards, that is considered such laches as to preclude the party from having relief in a court of equity, without going first to law. It was so decided in *Weller v. Smeaton*, 1 Cox, 102, and in *Reid v. Gifford*, 6 Johns. Ch. 19.

In the present case, the defendant has been in the uninterrupted possession of his buildings and works ever since the year 1825, carrying on his trade and business during the whole time, without any objection made by the plaintiffs until recently. And in addition he has proved a good *primâ facie* title by prescription. Whether the plaintiffs may be able to impeach this title effectually, we do not know ; but that question is to be tried in an action at law. And before its determination, this court, as a court of equity, will not interpose.

Nor is this a case in which the proceedings ought to be sus-

pendent until the trial and decision of the title at law. That would be a proper course to pursue, where a temporary injunction becomes necessary to prevent irreparable damage; but to justify such an interposition, the injury ought to be of such a nature as not to admit of delay. This is not such a case. And there seems to be no good reason to doubt, that if the plaintiffs can maintain an action at law, they may obtain an adequate remedy without any interposition of a court of equity. So if the nuisance complained of has become, or shall become, a public nuisance, the law has provided an effectual remedy.

Bill dismissed.

BENJAMIN MELVIN vs. PROPRIETORS OF THE LOCKS AND CANALS ON MERRIMACK RIVER.

Where the heirs of K. gave deeds to C. of land which they described as "the estate on which C. now lives," or "the estate called the C. farm," and "being the same which was conveyed by M. to K. by deed" bearing a certain date, and it was shown that C., as lessee of K., and otherwise, had previously occupied the whole farm for many years; it was held that the deeds passed the right and title of the heirs to the whole farm, although the deed from M. to K., which was therein referred to, did not include the whole.

Where several persons in succession enter on land as disseizors, their several possessions cannot be tacked so as to make a continuity of disseizin of sufficient length to bar the owner's right of entry, unless there is a privity of estate, or their several titles are connected; but where the first disseizor demises the land, and the lessee takes and keeps possession till the lessor's death, and afterwards remains in possession as tenant, either at will or at sufferance, of the disseizee, there is such a connexion of title as preserves the continuity of the disseizin.

Notorious and exclusive possession, without right, constitutes a disseizin: So does an entry under a void grant: Therefore where a demandant in a real action admits that there has been adverse possession for thirty years, he cannot set up the objection that the first entry upon him was by mistake as to the boundaries described in a deed, and, for that reason, not a disseizin.

A tenant in a real action is not estopped to set up a title by disseizin, by reason of his having relied, as one ground of his title, upon a deed which was found not to convey the demanded premises.

A married woman, whose land is delivered up on a writ of *habere facias* issued on a judgment against her husband, may make a formal entry on the land, (if her husband does not object,) for the purpose of preventing the statute bar of her right of entry. By *St. 1786, c. 13*, a married woman was barred of her right of entry, unless she made entry within thirty years next after that right accrued.

WRIT of entry, dated August 7th 1839, to recover seven acres and 142½ square rods of land in Lowell.

From the report of the case, made by *Dewey*, J. before whom the trial was had at October term 1840, it appeared that the demandant's grandfather, Thomas Fletcher, in August 1771, died seized of the demanded premises, leaving a widow, and two daughters, Rebecca and Joanna; and that he devised the use of one third part of his real estate to his widow, while she should remain such, and the residue, with cross remainders, to his said daughters. The said Rebecca, January 9th 1773, married Jacob Kittridge, who died in 1813, and she died in 1819. Said Joanna, in 1771, married Benjamin Melvin, the demandant's father, who died in April 1830, and she died in September 1826. The widow of Thomas Fletcher died in 1798.

There were ten children of the marriage of said Jacob Kittridge and Rebecca Fletcher, and seven children of the marriage of said Benjamin Melvin and Joanna Fletcher. And the demandant introduced deeds, executed in March, May and July, 1839, by the children of said marriages, or their representatives, conveying or releasing to him all their interest in the demanded premises. All these deeds were executed and delivered on the premises therein described; the several grantors having first made an entry, either in person or by their attorney authorized for that purpose.

The tenants objected to the sufficiency of these deeds to pass any estate to the demandant, and set up a claim to the demanded premises, under the heirs of said Jacob Kittridge. To support this claim, the tenants introduced an office copy of a deed from said Jacob, and Rebecca his wife, to Benjamin Melvin, the demandant's father, dated April 27th 1782, whereby, for the consideration of £300, they conveyed to him a moiety of a parcel of land in Chelmsford, (now Lowell,) formerly owned by Thomas Fletcher, which, as was admitted, included the demanded premises. The tenants also introduced an office copy of a deed of mortgage, of the same date, made by said Benjamin Melvin, and Joanna his wife, to said Jacob Kittridge, conveying to him a certain portion of the foregoing parcel, (and enclosing, as the tenants contended, the demanded premises,) to

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secure the payment of £300, in five years. In the first mentioned deed, the land was described thus : " A certain piece or parcel of land, lying in Chelmsford, containing by estimation about 130 acres, be the same more or less, viz. the one half and no more, reckoning the same for quantity and quality, the whole of which was some years past owned by Thomas Fletcher, late of said Chelmsford, deceased, and is bounded as follows, viz. beginning at the county road and running southerly on land of John Tyng ; thence turning and running westerly on said Tyng's land ; thence runs southerly upon land of Andrew Fletcher ; thence runs easterly upon land of Josiah Fletcher ; thence runs southerly upon land of said Josiah ; then runs westerly upon land of said Josiah ; thence turns southerly and runs on land of said Andrew Fletcher, till it comes to the northerly part of Meetinghouse Hill, so called ; then turns easterly and runs on land of said Josiah Fletcher ; then northerly on land of said Josiah ; then turns and runs easterly on land of said Josiah ; and then runs northerly on land lately belonging to the heirs of Henry Fletcher, deceased ; then turns and runs easterly on land of said Henry Fletcher, as the same was in his life time, and still easterly on land of Jacob Spaulding, till it comes to Merrimack River ; then runs northerly on said river, till it comes to land of the aforesaid Tyng ; then turns westerly, and runs on said Tyng's land ; then northerly till it comes to said river ; then runs up said river to the Mill Landing ; and from thence on the road, until it comes to the pound first mentioned." The description, in said mortgage deed from Benjamin Melvin and wife to Jacob Kittridge, was as follows : " A certain tract or parcel, lying in Chelmsford Neck, so called, containing by estimation 100 acres, be the same more or less, lying all together in one piece, without any division, except only one county bridle road, which runs through the northerly part of said farm or tract of land, being a part of the real estate of Thomas Fletcher, late of Chelmsford, deceased, with all the buildings," &c.

The tenants then introduced one part of an indenture of lease from said Jacob Kittridge to said Benjamin Melvin, dated April

17th 1793, whereby said Jacob demised, for the term of one year from date, a farm, which was thus described : " A certain farm in said Chelmsford, lying partly upon Merrimack River, near Pawtucket Falls, and formerly belonging to Thomas Fletcher, late of Chelmsford, deceased, containing 100 acres, be the same more or less, with all the buildings thereon, it being the same farm whereon the said Benjamin Melvin now dwells. He paying to said Kittridge £10 for rent of said farm for the term of one year. The said farm is bounded, beginning at a great elm tree standing at the corner of the town way, near to Nathan Tyler's house, a little north of the barn on said farm ; from thence something westerly, southerly and easterly, by a heap of stones, as the fence now stands, to the town way at or near Josiah Fletcher's most northerly corner, to a heap of stones ; from thence southerly by the land of the late Andrew Fletcher, deceased, about 124 poles to a stake and stones by the land of Jonathan Williams ; *from thence eastwardly*" [bounding southerly] "*by said Williams's land* 40 poles to a black oak stump, with stones on it, by the land of Josiah Fletcher ; from thence northwardly by said Fletcher's land 29½ poles to a heap of stones ; thence eastwardly 8 poles to a stake and stones ; from thence northerly and easterly about 170 poles by the land that belonged to the heirs of Henry Fletcher, late of Chelmsford, until it comes to Merrimack River ; from thence up said river until it comes to land that belongs to John Tyng ; thence westerly and northerly by said Tyng's land, until it comes to said river ; and thence up said river by said landing to the end of a wall near Tyler's Mills ; thence by the town way, until it comes to the bound first mentioned, including the same."

The tenants also introduced a copy of a writ, dated November 3d 1794, and returnable to the court of common pleas held in that month at Cambridge, in which said Kittridge demanded of said Melvin possession of the land described in the aforesaid lease. The land was described in said writ precisely as in said lease ; and said Kittridge, in said writ, alleged his seizin in fee

of the premises therein described, on the day of the date of said lease. Judgment was rendered for said Kittridge for the said premises, at the April term, 1796, of the supreme judicial court held in said county of Middlesex ; and a writ of *habere facias* issued thereon, dated April 19th 1796, which was never returned.

The tenants then produced a witness, who testified that he was present, in April 1796, when an officer "ordered said Melvin's things to be put out of doors, and they were cleared out ;" and that said Kittridge, on the same day, made a lease of the farm to Moses Cheever and Thomas Thissell for one year. One part of such a lease was then given in evidence by the tenants, which was dated April 10th 1796, and contained the same description of the premises as the aforesaid lease of 1793 to Melvin—*except* that a part of the southerly boundary in said lease of 1793, viz. "from thence eastwardly by the said Williams's land, 40 poles," &c. was omitted, and no other substituted.

The tenants also produced one part of another lease from said Kittridge to said Moses Cheever, of the same farm, dated May 16th 1803, for the term of three years from the 10th of April preceding. In this lease the farm was described precisely as in the aforesaid lease of 1793 to Melvin, giving the same quantity of land, same length of lines, same courses, monuments and adjoining lands—*except* that it mentioned Nathan Tyler's land, and not Jona. Williams's, as bounding on the south. On the back of this lease was a memorandum, signed by the parties, and dated May 15th 1806, agreeing that Cheever should occupy the premises therein described for the further term of three years : Also a similar memorandum, dated April 15th 1809, for the further term of three years.

The tenants then introduced several witnesses, the sum of whose testimony was, that Moses Cheever and Thomas Thissell occupied the Thomas Fletcher farm, one year from April 1796 ; that one Wheelwright then took it for five years, the two last of which years John Blanchard occupied it with Wheelwright ; that Blanchard occupied it alone one year afterwards ; that

Wheelwright and Blanchard occupied the demanded premises as a pasture, and also for sowing rye and buckwheat thereon, in different years; that Blanchard repaired the fence next to Tyler's land; that Moses Cheever returned to the farm in 1803, and lived on it twenty years or more, ploughed the demanded premises, and raised rye thereon, and made half the fence next to Tyler's land; and that during all the time while Wheelwright, Blanchard and Cheever were in possession of the farm, no other person was known to have made claim to the demanded premises.

The tenants then introduced deeds from five of the heirs of Jacob Kittridge, each conveying by deed of warranty or by release, unto Moses Cheever, one undivided tenth part of the real estate in Chelmsford, on which said Moses lived at the dates of said deeds. Also a deed to said Cheever of three undivided tenth parts of the same estate, described in the same manner, executed by Eli Forbes, as guardian of other heirs of said Jacob Kittridge. Also a quitclaim deed from John Kittridge to Eli Forbes, of one undivided tenth part of the same estate; and a quitclaim from said Forbes to said Moses Cheever of one undivided tenth part, "in quantity and quality" of the same estate. Also a deed from Anstis Kittridge, as administratrix of the estate of Benjamin Kittridge, to Henry Rice, of seven and a half undivided one hundredth parts of the same estate, and "called the Cheever farm," and another deed from said Anstis, as administratrix, as aforesaid, to said Rice, of two and a half one hundredth parts of the same estate, and also "called the Cheever farm."

All these deeds, except that from John Kittridge to Forbes, described the land thereby conveyed as the same "estate which was conveyed by Benjamin Melvin and Joanna Melvin to Doctor Jacob Kittridge by deed dated April 25th 1782," and as "being the farm on which said Moses Cheever now lives." The deed from John Kittridge to Forbes described the land as "containing 130 acres, more or less, it being that part of the real estate formerly owned by Thomas Fletcher, that was for many years, previous to 1814, rented by Doct. Jacob Kit-

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tridge." All the other deeds abovementioned, except those from Anstis Kittridge to Henry Rice, described the land as containing 100 acres, more or less, or about 100 acres, more or less. In the deeds from said Anstis to said Henry, the land is said to be "about 110 acres, be the same more or less." All the abovementioned deeds, that were *given to said Cheever*, were made in the year 1820.

The tenants also introduced two warranty deeds from said Moses Cheever to Thomas M. Clark, dated Nov. 1821, granting eight tenths of 100 acres, being the farm on which said Cheever then lived, and described as being the same that was conveyed to Jacob Kittridge by Benjamin and Joanna Melvin, April 27th 1782. Also a deed of warranty from said Cheever to Kirk Boott, dated January 1822, of one tenth of the same farm, described in the same manner. Also a quitclaim deed from said Thomas M. Clark to said Boott, of eight tenths of the same farm, and quitclaim deeds, made by said Boott to the Merrimack Manufacturing Company, of nine tenths of the same. Also a deed from Henry Rice abovementioned to said Manufacturing Company, of seven and a half one hundredth parts of the same. Also a quitclaim deed from said Manufacturing Company to the tenants, dated January 22d 1826, of nine tenths of the same; and a quitclaim deed from said Rice to the tenants, of two and a half one hundredth parts of the same, dated December 14th 1826.

The tenants also introduced a mortgage deed from Benjamin Melvin to Jona. Williams, dated July 9th 1785, conveying 16 acres of pasture, called Speen's Brook pasture, and 16 acres of plough land bounded southerly on said pasture, with covenants that said Melvin was seized in fee of said premises, and that they were free of all incumbrances. [This mortgage, as the tenants admitted, included the premises demanded in this suit.] Also a mortgage deed from said Melvin to James Varnum, dated April 6th 1795: Also deeds from said Melvin and wife, given in 1794, conveying that part of the land mortgaged to Williams, which lies south of the demanded premises.

The demandant—for the purpose of showing that neither

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the mortgage, leases nor deeds, from the heirs of Jacob Kittridge, which the tenants had introduced, included the demanded premises, and that they were separated from the farm by a town bridge road and fence—offered the following evidence: Leases from Jacob Kittridge to Benjamin Melvin, each for one year, dated April 17th 1789, 1790, 1791 and 1792, containing the same description of the demanded premises as in the lease of 1793, which was produced by the tenants: A copy of the laying out and acceptance of a town road, in March 1737, beginning at Hunt's Ferry at the mouth of Concord River; thence running northerly through the Neck Field, crossing Speen's Brook, &c.: A copy, from the probate office, of the appraisement of the real estate of which Thomas Fletcher died seized in fee, and the assignment of dower to his widow; in which a town road was mentioned as a boundary: The testimony of several aged witnesses, that the aforesaid town road was commonly used and travelled before the year 1782; that there was a fence on one side thereof across the Fletcher farm; and that Benjamin Melvin occupied the field south of said road up to the year 1800 and later.

The demandant also produced a copy of a writ in favor of Jona. Williams, dated Aug. 29, 1786, returnable at the following September term, wherein he demanded of said Benj. Melvin seizin and possession of the two lots of land described in the mortgage deed from Melvin to him, dated July 9th 1785, following the description in said mortgage: Also a copy of a conditional judgment for possession of the same land, rendered in favor of said Williams at the November term 1786; and a copy of a writ of *habere facias*, which issued on said judgment, February 16th 1787, with a return of an officer thereon, that he had, on the 10th of March 1787, given seizin and possession to said Williams of the land described in said writ: Also a quitclaim deed from said Williams to said Melvin of said two lots, dated November 24th 1794: Also a release, dated November 7th 1795, from James Varnum to said Melvin, of the premises mortgaged to said James by deed of April 6th 1795.

The report of the judge, who tried the case, concluded thus: The facts testified to by the tenants' witnesses, so far as they

tend to show an occupancy of the demanded premises by Wheelwright and Blanchard, are to be taken as proved. Also the occupancy of the same by Cheever, since 1803, is to be taken as proved; and it is admitted that after and ever since the deeds to the Merrimack Manufacturing Company, before mentioned, were given, the tenants have claimed and occupied the demanded premises. It is admitted that the heirs of Joanna Melvin entered upon the demanded premises in July 1832, and that they, in May 1833, sued out writs of entry, on their own seizin, to recover the same, which were discontinued in 1835; that they then joined in a writ of right, which was continued in court till October term 1836, when Rufus Melvin, one of the demandants therein, executed a release of the same action to the tenants.

Upon the foregoing evidence, the tenants contended, 1st. That from the sundry leases made by Kittridge to Melvin, from 1789 to 1793, inclusive, the legal presumption was, that Kittridge had made an entry upon the land described in the leases, by virtue of his mortgage from Melvin and wife, for condition broken, and that, prior to the date of the writ against Melvin, in 1794, the mortgage had been foreclosed. 2d. That the boundaries and distances, as mentioned in the leases, must necessarily include the demanded premises. 3d. That if the leases include the demanded premises, the parties, within a few years after the date of the mortgage, when the boundaries were well known, must have fixed the extent of the land embraced in the mortgage; and that, from 50 years' acquiescence, and more than 40 years' possession, the presumption was, that the mortgage included the demanded premises. 4th. That if neither the leases nor the mortgage included the demanded premises, yet the entry by Kittridge in 1796, and his ejectment of Melvin and his wife and family, operated as a disseizin of Melvin and wife, and that from the continued possession of Kittridge or his lessees, and their occupation, &c., of the demanded premises, as a part of the Cheever farm, and from the fact that every successive grantee occupied them in the same manner, they would pass by the description contained in any of the deeds from Kittridge's heirs,

or any of the subsequent deeds under which the tenants claim ; and that the heirs of both Kittridge and Melvin would be barred.

The demandants contended, 1st. That the mortgage deed, from Benjamin Melvin and wife to Kittridge, did not include the demanded premises. 2d. That the tenants, by producing said mortgage deed, and relying upon it as one ground of their title, were thereby estopped to set up a title, afterwards, by disseizin. 3d. That if the tenants are not so estopped, yet that the facts, as proved, did not constitute a disseizin of Melvin and wife by Kittridge. 4th. But if Melvin and wife were disseized by Kittridge, yet that the tenants had failed to connect themselves with such disseizin by any sufficient and continuous title ; and that the title (if any) acquired by Kittridge or Cheever, by wrong, became extinguished, either by their abandonment of the premises, or by the releases to the demandant. 5th. That the demandant had a right of entry into the demanded premises, when he commenced this suit. /

The presiding judge suggested to the counsel, that upon the matter of law which had been raised upon the construction of the various conveyances from the heirs of Kittridge, from Moses Cheever to Thomas M. Clark, from said Clark to Kirk Boott, from said Boott to the Merrimack Manufacturing Company, and the deeds from that company and from Henry Rice to the tenants — he should rule that those deeds were not necessarily to be restricted to the quantity of land actually included in the mortgage from Melvin and wife to Kittridge ; but that, if it should appear to the jury that the land on which Cheever lived, and which was called the Cheever farm, and occupied as such adversely to the demandant and those under whom he claims, did embrace the demanded premises, it was competent for the jury to find the effect of the abovementioned deeds to be such that they might connect the several adverse possessions of the successive grantees as one continuous disseizin. The counsel for the demandant thereupon stated, that under the proposed instructions, there would be no question for the jury, inasmuch as the evidence, as they conceded, showed that there had been an adverse possession in Cheever and the other grantees, for

more than 30 years before the institution of this action ; but they relied upon the effect of the deeds, and the legal construction to be given to them, to show that the disseizins were ineffectual against the demandant, as they were successive and disconnected. And at the request of the demandant, and with a view to settle, by the jury, the mere question, whether the demanded premises were included in the mortgage of Benjamin Melvin and wife to Jacob Kittridge, the question of disseizin and defence, arising from adverse possession, was taken from the consideration of the jury, the demandant agreeing, that if a verdict should be returned in his favor on the question that was to be submitted to them, the further question, viz. that of defence arising from disseizin, should be reserved for the consideration of the whole court ; and that, if upon all the evidence and all the inferences that a jury might properly draw from the facts proved, the court should be of opinion that it was competent for the jury to have found a verdict for the tenants, on the ground of adverse possession and disseizin, then the demandant should become nonsuit. But if, upon the whole evidence, the court should be of opinion that it would not have been competent for the jury to find a verdict for the tenants, upon the ground of disseizin, then that judgment should be entered for the demandant, unless other grounds of defence, taken in the case, show a sufficient bar to his right to recover.

The question whether the demanded premises were included in the mortgage of Melvin and wife to Kittridge, dated April 25th 1782, was submitted to the jury, who found that they were not included therein ; and thereupon the remaining question of disseizin was reserved, upon the terms above stated.

This case was argued at the last October term, before Shaw, C. J. and Justices Wilde and Dewey, by *Greenleaf & G. Parker*, for the demandant, and by *S. Hoar & Robinson*, for the tenants.

The opinion of the three justices, who heard the argument, was delivered at the present term, by

WILDE, J. This is a writ of entry, wherein the demandant demands possession of a parcel of land in the city of Lowell, of

great value, and consequently the decision of the case is of great importance to the parties ; and the questions to be decided, or some of them, are not free from doubts and difficulties, which we have found on examination somewhat perplexing ; as to which, however, on reflection, taking into consideration all the facts and circumstances of the case and the authorities cited, we have come to a conclusion which we deem correct and satisfactory.

Much evidence was introduced at the trial, as to boundaries and other matters ; and several questions of law and fact were raised, only one of which, however, was submitted to the jury. The title of the tenants was derived from Dr. Jacob Kittridge, who derived his title by a mortgage deed to him from Benjamin Melvin, the father of the demandant ; and the question, whether this mortgage deed included the demanded premises, was left to the jury, who found that it did not. Another important question was, whether the tenants had made out a good title by disseizin ; and this question, by the consent of parties, was reserved for the determination of the court — the demandant admitting that there was proof of an adverse possession in the tenants, and those from whom they claim title, for more than thirty years before the institution of this action ; but they denied that these adverse possessions were so connected by the tenants' title deeds, as to constitute a continuous disseizin ; and this is one of the principal questions submitted to the consideration of the court, upon the legal construction of those deeds. It was further agreed, that if, upon all the evidence and all the inferences that a jury might properly draw from the facts proved, the court should be of opinion that it was competent for the jury to have found a verdict for the tenants, on the ground of adverse possession and disseizin, then the demandant was to become nonsuit. This agreement secures to the tenants, substantially, the benefit of a verdict in their favor on this ground of defence. But we do not think much depends on the form of the agreement ; as the questions of law are to be principally, if not wholly, decided upon facts respecting which there is no dispute.

The descriptions in the several deeds are nearly similar, and we do not consider the variance in the language of them as ma-

terial in the decision of the question of their construction. Some of them are deeds of release and quitclaim, and others contain the usual covenants of seizin and general warranty. This difference also we do not consider of much importance. The question depends mainly on the description of the granted or released premises. The land, as conveyed in the deeds from the heirs of Dr. Kittridge to Moses Cheever, is described as follows: A certain share of "about one hundred acres of land, be the same more or less, with the buildings thereon standing, situate in the town of Chelmsford, in the county of Middlesex, being the same estate on which the said Moses Cheever now lives, and which was conveyed by Benjamin Melvin and Joanna Melvin to Dr. Jacob Kittridge, by deed dated the 25th day of April 1782." In some of the deeds, the expression is, "the estate called the Cheever farm": In others, it is described as "a tract of land on which the said Moses Cheever now lives": And in all, the deed of Melvin to Kittridge is referred to as a further description of the premises intended to be conveyed.

When these conveyances to Cheever were made, he was in the open and exclusive possession of the demanded premises; so that, according to the verdict of the jury, the two descriptions do not agree. And the question is, which of them is to be considered, according to the rules of law, as the true description, by which we are to ascertain the estate intended to be conveyed. One of the rules of construction, which has some bearing on the present question, is, that where there is a doubt as to the construction of a deed poll, it shall be taken most favorably for the grantee. If, therefore, there be two descriptions of the land conveyed, which do not coincide, the grantee is entitled to hold by that which will be most beneficial to him. It must, however, be a case of real doubt; for if one of the descriptions be more certain than the other, the more certain description must govern, although the construction may be less favorable to the grantee. For it is another well known rule in the construction of deeds and other instruments, that if some of the particulars of the description of the estate conveyed do not

agree, those which are uncertain, and liable to errors and mistakes, must be governed by those which are more certain. Thus the boundaries of lands by known monuments are always to control the description by courses and distances; and so courses and distances will control the quantity of land expressed. Another rule of construction is, that if the description be sufficient to ascertain the estate intended to be conveyed, it will pass, although some particular circumstance be added inconsistent with the description. But if the description be general, and a more particular description be added, it will operate by way of restriction. 5 East, 51. 4 Mass. 205. By the application of these well established rules to the present case, we think we may ascertain, with reasonable certainty, the estate intended to be conveyed by the deeds to Cheever.

Several of the cases cited by the counsel seem to be directly in point, but they are not all easily to be reconciled. I will first refer to those cases which seem to support the construction contended for by the counsel for the tenants. In *Worthington v. Hylyer*, 4 Mass. 196, the words of description are "all that my farm of land in said Washington, on which I now dwell, being lot No. 17 in the first division." The land demanded in that action was not included in lot No. 17, yet the court held that it passed—the first description being sufficient to ascertain the estate intended to be conveyed—and that the additional description, being inconsistent with the former, was to be rejected; because, if it were to be considered as an essential part of the description, the deed would be void for repugnancy. In *Cate v. Thayer*, 3 Greenl. 71, the question was as to one of the lines of the town of Dresden, which was described as a course "north-northeast including the whole of Gardiner's farm;" and the court held that the whole farm was included, although intersected by a line running north-northeast; because the farm was to be considered as a monument. In *Keith v. Reynolds*, 3 Greenl. 393, the description was, "a certain tract of land or farm, in Winslow, included in the tract which was granted to Ez. Pattee," and afterwards there was added a particular description by courses and distances, which did not include the

whole farm. It was contended that the particular description should prevail, in preference to the other which was more general and uncertain; but it was decided that the first description was certain enough, and that it was to be adopted rather than the description by courses and distances, which was more liable to errors and mistakes. In *Lodge v. Lee*, 6 Cranch, 237, the description was, "all that tract or upper island of land, called Eden;" and then it was added, "beginning at a maple tree," and describing the land conveyed, by bounds, courses and distances; but so as not to include all the island. The court held that the whole island passed. In *Jackson v. Barringer*, 15 Johns. 471, the grant was, "the farm on which J. J. D. now lives," which was bounded on three sides, and "to contain eighty acres in one piece." The farm contained 149 acres; and the decision was, that the whole farm passed. In *Smyth v. Eyres*, Cro. Car. 546, the land conveyed was described as "all that the grantors' glebe lands lying in Chesterton, viz. 78 acres of land, with all profits, tithes, &c."; and then were added the words, "all which lately were in the ferm or occupation of Margaret Peto." It was found that the tithes of these glebe lands never were in the tenure of Margaret Peto, though other lands and tithes were. But it was held, notwithstanding, that the lands and tithes, first described, passed. In *Eliot v. Thatcher*, 2 Met. 44, *note*, the land conveyed was thus described: "All my real property or homestead, so called, lying and being in Dartmouth, together with about 30 acres of land, let the same be more or less, &c.; for more particular boundaries reference may be had to a deed, given by Clark Ricketson to David Thatcher, of the above mentioned premises." It appeared that the grantor was seized only of a part of the land which he bought of Ricketson, but he had bought some land adjoining thereto, being in the whole about 30 acres. And it was decided that the whole passed; it being held that the word "homestead" was a sufficiently certain description, and that the grant ought not to be limited and restrained by the subsequent reference to Ricketson's deed; it being a well known rule of construction of deeds, that a precedent particular de-

scription shall not be impaired by a subsequent general description or reference ; and that deeds are to be construed according to the intention of the parties ; and that if there be any doubt or repugnancy in the words, such construction is to be made as is most strong against the grantor, because he is presumed to have had a valuable consideration for what he parts with.

These cases certainly are strongly in favor of the construction of the deeds in question, which is contended for by the tenants' counsel.

But in the case of *Barnard v. Martin*, 5 N. Hamp. 536, and in *Woodman v. Lane*, 7 N. Hamp. 241, a different rule of construction was adopted. In the former case, the grant was "my homestead farm, it being the same land conveyed to me and J. M. by C. B.," which did not in fact include the whole homestead farm ; and it was decided that the former description was controlled by the latter. In the other case, the grant was, "my homestead farm, and is the same land which was conveyed to me by the deeds of" [several persons named,] "for a more particular description reference may be had to said deeds ;" and the same decision was had as in the former case. See 8 East, 103. Plowd. 191.

The weight of authority, however, is we think clearly in favor of the former decisions.

In the present case, if the land had been conveyed by reference to known monuments and boundaries, it would be clear that the subsequent reference to the mortgage deed would not operate by way of restriction ; and we think there is no good reason why the description in these deeds—the boundaries of the farm conveyed being certain, and undoubtedly well known to the parties—should not be held equally conclusive. There are also several extraneous circumstances, which favor this construction. In 1793, Kittridge made a lease of the premises to Melvin, in which they were particularly described by metes and bounds ; and the presumption is, that a survey had been taken after the mortgage deed had been given ; for the description of the premises in that deed is very general and loose. This lease, taken in connexion with the subsequent leases to Cheever, must

be construed so as to include the demanded premises. The description is similar, except that the lease to Cheever, in 1803, bounds the premises on Tyler. There is in this lease also a mistake in the length of one of the lines ; but taking the description all together it is sufficiently clear, and the mistake in the line is obvious from the monuments and abutments referred to in the subsequent part of the description. Then it appears that after Melvin's lease had expired, he was sued by Kittridge, who recovered judgment against him for possession, in 1796, and immediately took possession and leased the premises to Cheever and Thissell ; and that Cheever built a fence on the Tyler line, and occupied up to that line. The description of the premises, in Kittridge's writ, may not be sufficiently certain to be conclusive against Melvin ; but there can be no doubt that the parties well understood what land was sued for in that writ. These facts raise a strong presumption that the mortgaged premises were located by the parties according to the tenants' claim. Melvin acquiesced, never making any claim, until his death in 1830. And in the meantime he conveyed his lands to Tyler and others up to the line to which the tenants now claim. These circumstances must have been well known to the heirs of Dr. Kittridge, when they conveyed to Cheever ; and if so, they certainly ought to have a controlling influence in ascertaining the intention of the parties to those conveyances.

And the strong presumption is, that the heirs intended to convey and relinquish all their right and title to the Cheever farm, however it might have been acquired. No other reasonable inference can be made from the language of the deeds and the facts proved. And this presumption is much strengthened by the conduct of the parties since the conveyance. The long acquiescence of the heirs in the possession of Cheever, and those to whom he conveyed the premises, taking into consideration their greatly increased value, is a strong circumstance to show that the parties supposed that the whole farm had been conveyed. Upon the whole, therefore, we can have no doubt as to the intention of the parties ; and we think there is no technical rule of law, as to the construction of deeds, that

should deprive the grantee of any part of the land intended to be conveyed, and for which, it must be presumed, he paid a valuable consideration. We have no doubt that the parties believed, and had good reason to believe, that all the Cheever farm, as it was called, was included in the mortgage deed; but if it was not, the mistake is not to prejudice the grantee, in favor of the grantors. We are therefore of opinion, upon the whole matter, that all the title of the heirs of Dr. Kittridge to the Cheever farm passed by their conveyances, whether it was derived from the mortgage deed, or was acquired by disseizin.

But supposing we should adopt the construction contended for by the demandant's counsel, still the question would remain, whether the tenants have not made out a good title. Admitting this construction, the objection is, that the heirs of Melvin, who entered on the premises in 1832, had a good right of entry, because Cheever's possession, after the death of Dr. Kittridge, was less than 20 years; and this is unquestionably so, unless the possession of Kittridge and Cheever were so connected as to have kept up a continuous disseizin. For it is a principle well established, that where several persons enter on land in succession, the several possessions cannot be tacked, so as to make a continuity of possession, unless there is a privity of estate, or the several titles are connected. Whenever one quits the possession, the seizin of the true owner is restored, and an entry afterwards by another, wrongfully, constitutes a new disseizin; as was decided in *Potts v. Gilbert*, 3 Wash. C. C. 475. And the same principle is laid down in *Ward v. Bartholomew*, 6 Pick. 415; in *Brandt v. Ogden*, 1 Johns. 158; in *Doe v. Campbell*, 10 Johns. 475; in *Jackson v. Leonard*, 9 Cow. 653; and in *Allen v. Holton*, 20 Pick. 465.

But in the latter case it was decided, that where one of two disseizors, in possession as tenants in common, abandons the land, the abandonment does not enure to the benefit of the disseizee, but the cotenant holds the land against the disseizee, in the same manner as if he had been from the beginning a sole disseizor. No conveyance of the moiety held by the other disseizor is necessary, and the disseizee cannot regain his seizin,

except by entry or action ; for he cannot hold jointly, or in common, with the disseizor. The same principle seems to be applicable to the present case. While Cheever's lease continued in force, there was a privity of estate between him and Dr. Kittridge, his lessor ; and so there was between him and the heirs of Kittridge, after his death, if he occupied with their consent, as a tenant at will. It is said, however, that there is no privity of estate between the owner of land and a tenant at sufferance. But whether Cheever was a tenant at sufferance, or tenant at will, there was such a connexion of title between him and Kittridge and his heirs, as would be sufficient to preserve the continuity of the disseizin.

The next objection to the tenants' title is, that Kittridge entered by mistake as to the boundaries of the mortgage deed, and that such an entry would not constitute a disseizin ; or if it would, that as the tenants relied on the mortgage, as one ground of their title, they are estopped to set up a title by disseizin. We think there is no good ground for this objection, in either branch of it. As to the supposed mistake, the demandant cannot now set up the objection ; for by the report it appears, that his counsel admitted that thirty years of adverse possession had been proved ; and adverse possession, without right, constitutes a disseizin, provided the possession be notorious and exclusive. But if there had been no such admission, there is nothing in the case reported to support the objection. For Kittridge entered in 1796, under his judgment. He entered, therefore, under a title hostile to that of Melvin ; and if his title was not good, the entry and expulsion of Melvin clearly constituted a disseizin. If one enters under a void grant, he is a disseizor. L

The only other question which remains to be decided is, whether the right of Mrs. Melvin, the mother of the demandant, has been barred. The argument is, that if the demanded premises were included in the judgment which Kittridge recovered against Melvin, neither he nor his wife had any right to enter ; and therefore their neglecting to enter would not bar her right. To this argument there are several objections. In the first place, the premises are not described with sufficient certainty to

Melvin v. Proprietors of Locks & Canals on Merrimack River.

bar Melvin's title, if he had a good title to a part of the premises before the judgment. To make the judgment conclusive, as to the extent of the land recovered, it must be described, in the writ or judgment, with great certainty; otherwise the sheriff cannot know of what land he is to deliver possession on the writ of *habere facias possessionem*. And if he delivers more than is described in such writ, an action upon the case will lie against him. It is important, therefore, that the land should be described with great accuracy and certainty. The sheriff is not to be called upon to give a construction to a vague or inconsistent description. This is within the province of the court alone to determine. A description of land, though inconsistent in some respects, may be sufficiently certain to pass the estate intended to be conveyed, but not sufficiently certain to be a good foundation for a conclusive judgment. The grant of all a man's lands in a town, county or state, would be sufficiently certain to pass a title to his lands; but such a description would not be sufficient in a writ of *habere facias possessionem*.

But supposing Melvin's right of entry was barred by the judgment, it does not follow that his wife could not enter to prevent her right from being barred by the statute of limitations. An estate in remainder or reversion may be taken in execution, and the officer may enter for the purpose of delivering seizin to the judgment creditor, without being a trespasser upon the tenant of the particular estate. And for a like reason, the wife of Melvin, he not objecting, might make a formal entry on the land, (though *he* could not,) for the purpose of preventing the statute bar.

And lastly, another and a decisive answer to the argument of the counsel for the demandant is, that the statute of limitations is express and clear, that when a right of entry into any lands, tenements or hereditaments, accrues to a feme covert, her right of entry is barred, unless she enters within thirty years from the time her right of entry first accrued; as was decided between these same parties, in 16 Pick. 161. This may have been an unwise law, and it has been since altered by the Rev Sts. c. 119, § 5. But the language of St. 1786, c. 13, is clear,

Haven v. City of Lowell.

and must govern the present case. We think it has been clearly proved, that Mrs. Melvin was disseized as early as 1796, and neither she nor her heirs ever entered before 1832. They had then no right of entry, and have never been lawfully seized.

We are therefore of opinion that the tenants have made out a good title to the whole premises, on the grounds stated, and are entitled to judgment.

SAMUEL F. HAVEN vs. CITY OF LOWELL.

The case of *Spaulding v. City of Lowell*, 23 Pick. 71, recognized and confirmed.

A town duly passed a vote appointing a committee to purchase certain land for the site of a market house, to make an estimate of the expense of such house, and to report at the next town meeting: The warrant for the next town meeting was, "to hear reports of committees appointed to purchase land, and furnish an estimate of the expense of a market house; to see if the town will authorize their treasurer to borrow, on the credit of the town, such sum of money as may be necessary to enable said committee to purchase the land and erect a suitable building for a market house; or act on that subject as they think proper:" At that meeting, the committee reported that they had purchased the said land, and recommended that the town should purchase an additional lot of land, adjoining that already purchased, and thus obtain a more commodious site for the market house: Whereupon the town voted, (among other things,) that said committee be authorized to purchase said additional land. *Held*, that the subject matter of this vote was so inserted in the warrant, as to give the vote full legal operation, under *St. 1785, c. 75, § 5*.

An agreement for the purchase of land for a town, made by all the members of a committee duly authorized by the town to purchase it, and put in writing and signed by part of the committee, on behalf and at the verbal request of the committee, is the written agreement of the whole committee, and binding on the town. Where an agreement, made for the purchase of land for a town, by a committee of the town, is invalid, such agreement is ratified and confirmed by a subsequent vote of the town, authorizing the committee to complete the purchase of the land by them bargained and contracted for.

BILL IN EQUITY for a specific performance of an agreement for the purchase of land.

It appeared from the bill, the answer, and an agreed statement of facts, that the town of Lowell, at a legal meeting on the 2d of March 1835, chose a committee of seven persons to consider the expediency of the erection of a market house by the town, and to report thereon at the next April meeting: That said committee, at a legal meeting of the town on the 6th

of April 1835, reported that it was expedient to erect a market house, and that they had found an unoccupied piece of land on Middle Street, which could be procured for $62\frac{1}{2}$ cents per foot, and which they recommended as a site for such house ; and that the town thereupon voted that the persons constituting said committee be a committee to purchase said land on Middle Street, to prepare a plan for a market house, to make an estimate of the expense of said house, and to report at the next town meeting : That a meeting of the town was duly held on the 27th of the same April, and that the second article in the warrant for calling that meeting was, " to hear reports of committees appointed to purchase land and to furnish an estimate of the expense of a market house ; to see if the town will authorize their treasurer to borrow, on the credit of the town, such sum of money as may be necessary to enable said committee to purchase the land and erect a suitable building for a market house, or act on that subject as they think proper : " That at this meeting the aforesaid committee reported that they had, agreeably to the direction of the town, purchased, for the site of a market house, a piece of land on Middle Street, of the dimensions of " two hundred and forty feet in width by ninety in depth, at $62\frac{1}{2}$ cents per foot, amounting to \$ 13,576," and that the probable expense of such house, (built according to a plan exhibited by them,) would not exceed \$ 10,000 : That the committee reported at the same time, that since they had purchased said land on Middle Street, an additional quantity of land, situate on Lowell Street, and adjoining to the land already purchased, had been offered to them, which was one hundred and forty seven feet in width, and ninety in depth, the average price of which was ninety cents per foot, amounting to \$ 11,984.52, and which they recommended that the town should purchase ; whereby the town would be " in possession of five thousand feet of more land, the whole extending from Middle Street to Lowell Street, one hundred and eighty feet in length, by one hundred and forty seven feet in width, containing twenty six thousand six hundred and thirteen feet ;" on the centre of which the committee proposed to place the market

house, and which, when completed, would extend from street to street : That the town thereupon voted that the said committee be authorized to purchase the land on Lowell Street, and to build a market house one hundred and sixty six feet in length, according to the plan exhibited ; and that " the treasurer of the town be authorized and empowered to pledge the credit of the town to secure any loan which might be procured for the purpose of buying land on which to erect a market house, by signing or executing any bond or other security necessary for that purpose, for a sum not exceeding \$ 40,000 : " That on the 29th of April 1835, the following agreement was made, and was signed by two members of said committee, on behalf and at the verbal request of the committee : " Lowell, April 29th 1835. The committee, appointed by the town of Lowell to purchase land and erect a market house, agree to purchase Samuel F. Haven's part of a lot of land on Lowell Street, owned in common with Wright & Mixer, at ninety six cents per square foot. The papers to be made out as soon as practicable, and the title is ascertained to be clear of incumbrance. For the committee JOHN NESMITH. JONATHAN TYLER : " That the plaintiff, on said 29th of April, gave to said committee an obligation to convey said land, for said sum : That a meeting of the town was duly held on the 1st of June 1835, and that the fourth article in the warrant for calling that meeting was as follows : " To see if the town will authorize their committee, or a major part of them, to borrow, on the credit of the town, a sum sufficient to purchase the land on Lowell and Middle Streets, now contracted for by said committee, in behalf of the town, and erect thereon a building to be used as a market house, and prescribe the manner of effecting a loan, and the terms and duration thereof, and instruct the town treasurer not to pledge the credit of the town for the loan which was voted to be procured, at the town meeting held April 27th 1835 : " That in acting on said article in the warrant, the town voted that the aforesaid committee, or a majority of them, " be authorized and empowered to complete the purchase of the land, by them bargained and contracted for, of the Proprietors of the Locks

and Canals on Merrimack river, situated on Middle Street, and of Joseph B. French, Samuel F. Haven, Elijah Mixer, and Hapgood Wright, on Lowell Street, for the site of a market house for the use and accommodation of the inhabitants of the town ; and that said committee be fully authorized and requested to erect, or cause to be erected thereon, a market house one hundred and sixty six feet in length and forty five feet wide, conformably to a plan or model presented to the town ; that said committee or a majority of them be authorized to borrow a sum not exceeding \$40,000 on the credit of the town, for the purpose of purchasing the necessary land and erecting thereon a market house for the use and accommodation of the citizens of the town, and to give proper security for the money they may borrow, making the same payable in not less than ten nor more than twenty years, or at various times within those limits ; and that all authority, heretofore given to the town treasurer to borrow money or pledge the credit of the town for the purpose of building a market house, be revoked : ” That on the 31st of October 1835, a meeting of said town was duly warned and held, at which the aforesaid committee made a report, stating that they had been foiled in all their attempts to carry into effect the votes of the town, passed at the meeting holden on the 1st of June preceding, but that they had secured a lot of land, between Lowell Street and the canal, two hundred and five feet long, and ninety feet wide, and paid therefor seventy-five cents per foot, “on their own responsibility,” amounting to \$14,055 ; which lot they deemed more eligible for the site of a market house than any other which could be obtained : That the town thereupon voted to accept said report, to purchase said lot of land at the price aforesaid, take a deed thereof, build a market house thereon, not exceeding one hundred and sixty six feet in length, and fifty feet in width, nor less than one hundred and forty feet in length, and forty five feet in width, two stories high, &c. ; and “that all votes previous to this meeting, upon the subject of a market house, be rescinded : ” That the plaintiff had always been ready to perform his part of the aforesaid agreement of the 29th of April 1835, and that he, after the

passing by the town of the votes last above mentioned, requested the aforesaid committee and the town to pay him for his said land, according to said agreement, and tendered a deed of the same, but that the said committee and the town had wholly neglected and refused to perform their part of said agreement.

It was agreed by the parties, that if the court should be of opinion that the defendants are bound to perform the agreement above set forth, they should not be required to take a conveyance of said land, but that the cause should be referred to a master to ascertain and report the amount of damages that should be paid to the plaintiff in consequence of their non-fulfilment of said agreement : The damages to be ascertained by finding the difference between the present cash value of said land and the sum contracted to be given therefor, and by adding to the said difference the interest on the sum, thus contracted to be paid, from the date of said agreement ; and execution to issue for the amount of damages thus ascertained.

T. P. Chandler, for the plaintiff.

Dexter & Robinson, for the defendants.

HUBBARD, J. This is a bill in equity for the specific performance of a contract entered into by the inhabitants of the town of Lowell with the complainant, as he alleges, for the purchase of a piece of land on which to erect a market house.

The case comes before the court on the bill, answer, and an agreed statement of facts, consisting principally of certain votes and proceedings of the town of Lowell.

The town having relinquished the purchase of the land of the plaintiff, in consequence of their inability to procure other lands in the vicinity which were necessary for the completion of the plan contemplated by them, now deny their obligation either to take the said land, or to satisfy the plaintiff for the loss on the same, and contend that he has no legal or equitable right that can be enforced against them.

The defendants, who are the successors of the town of Lowell, allege, in substance, three grounds of defence against the plaintiff's bill ; one, that the land in controversy was not

necessary for the purpose contemplated by the town, and therefore they were not authorized to purchase the same ; a second, that the subject of purchasing the land of the plaintiff was never legally brought before the inhabitants of the town in such manner as to bind the defendants by any vote relating to the same ; and a third, that the contract was not duly executed by the committee on behalf of the inhabitants, nor afterwards ratified by them.

As to the first objection, that the land in controversy was not necessary for the purpose contemplated by the town—which was the erection of a market house on a large scale—we consider it virtually settled in *Spaulding v. City of Lowell*, 23 Pick. 71, in which case the same question arose in regard to the market house actually built, and the uses to which it was applied. In the close of their opinion, the court say, “as to the size and other circumstances of the building” (which necessarily included the land purchased on which it was erected,) “if the accomplishment of the object was within the scope of the corporate powers of the town, the corporation itself was the proper judge of the fitness of the building for its object, and it is not competent, in this suit, to inquire whether it was a larger and more expensive building than the exigencies of the city required.” So in this case, the object being within the powers of the town, we think it was competent for the inhabitants to determine the size of the lot that would be necessary and commodious for the uses intended, and that for this purpose they might properly consider the progressive increase of the town.

It is contended by the defendants, that the second article in the warrant for calling the town meeting on the 27th of April is confined to the subject of borrowing money, and cannot be extended to include the purchase of land, other than that already contracted for, on which to erect a market house. *St. 1785, c. 75, § 5*. In giving a meaning to this article, if we were to treat it as a contract between parties, we might be disposed to yield to the limited construction put upon it by the defendants. But we cannot view it in such a light. The articles inserted in warrants for calling town meetings, presenting the various sub-

jects for the consideration of the inhabitants, are from the very nature of the case general in their description, and are oftentimes inartificial in their construction. They are the mere abstracts or heads of the propositions which are to be laid before the inhabitants for their action; and matters incidental to and connected with such propositions are alike proper for their consideration and action. If it were otherwise, and the articles were to be the subject of a very critical analysis, much confusion and delay might ensue, and towns would be as often employed in discussing the construction of the articles in the warrant, as in the consideration of the subjects embraced in them.

In the present case, the town were called upon to hear the report of the committee appointed to purchase land on which to erect a market house and furnish an estimate of the expense attending it, and to determine whether the town would borrow money to enable the committee to make the purchase and erect the building, or to act on the subject as they might think proper. Now the town, at a previous meeting, had not only been informed that the committee had selected a suitable piece of ground which could be obtained at a given price, and that in their opinion it would be wise for the town to secure it; but the town had acted on their report, and the same committee were appointed to make the purchase and prepare an estimate of the expense of the house. But it must have been obvious to any one taking an interest in the matter, that the committee, though authorized to purchase the land, might find embarrassments in the way, either as it regarded the title, or the terms of payment, or the security to be given; or they might have found a more eligible site; or they might alter the plan of the intended building, and might need more land to carry into effect any such alteration, to the greatest advantage; as the town was then in a state of rapid growth. It is therefore no forced construction to give to the article a more enlarged meaning than the defendants contend for, and to say that it included the whole subject of the purchase of land and the plan of a building; that the inhabitants might well believe that the whole matter was still open for their consideration, and would readily expect that

changes might be reported by the committee on the subject generally, upon which they would be called upon to act ; as well as on the manner of procuring the loan to carry the project into effect.

But even if we had doubts as to giving this enlarged construction to the article, we are satisfied that the subject was fully presented to the town at the meeting on the 5th of June, and that the inhabitants then acted with a full knowledge and understanding of the agreement on the part of the committee to purchase the land of the plaintiff.

This raises the questions, whether the contract signed by two of the committee of the town, and delivered to the plaintiff, was duly executed by the committee so as to bind the town ; or, if informal and imperfect as an agreement, whether the act of the town, at their meeting of the 5th of June, was not only a waiver of such informality, but a ratification of the act of the committee.

In respect to the contract signed by two of the committee, and exchanged with the plaintiff for a memorandum taken from him, agreeing to convey the said land to the town, it is well understood, that unless otherwise instructed by the body appointing them, committees act by majorities, and that it is usual for one to sign on behalf of the rest ; and in common cases, the signature of one of the number, purporting to be for the committee, will be good *primâ facie* evidence of the act of the committee. And we think where two sign in behalf of the whole, the inference is the same. It is indeed agreed by the parties that the paper was signed by two at the verbal request of the other members ; but further than that, it is evident it was the act of the committee, from the fact that the town, at the meeting of June 1st, voted to authorize the same committee, or a majority of them, to complete the purchase of the land by them bargained and contracted for with the plaintiff, for the site of a market house, &c. If therefore the contract were defective in the manner of its execution, this vote is such a confirmation and ratification of the doings of the committee, as would effectually cure any such defect ; and it would have probably

precluded the plaintiff from denying that the town had bound themselves to him, if they had called on him to make the conveyance, and he had refused. / Though the defendants have contended that the meeting of the 1st of June did not confirm the contract of April 29th, nor authorize the committee to proceed until the money was procured, yet we entertain no doubt on this point. The meeting was called to see if the town would borrow money to complete the purchase of the land contracted for, including the plaintiff's, and to enable them to erect the building. And the town at their meeting deliberately ratify the contracts for the land, and in an independent vote direct and empower the committee to borrow, on the credit of the town, a sum sufficient for the purchase of the land and the erection of the market house. And these contracts would have been completed, but for difficulties which arose in regard to effecting a loan on the credit of the town ; and there appears to have been no default or inability on the part of the plaintiff to comply with his undertaking.

Without farther enlarging on the facts, we are of opinion that the contract, made by the committee of the town with the plaintiff, was well executed on the part of the committee, was ratified by the town at a meeting in which the subject of such contract was legally brought before them, and that they are now bound to fulfil their engagement, notwithstanding they found it necessary to make a purchase of land afterwards in a different place.

According to the agreement of the parties, the case is to be sent to a master to ascertain the difference between the present cash value of the land and the price contracted to be given therefor, with interest on the amount, thus ascertained, from the time of the contract.

NATHAN PERKINS & wife *vs.* JOEL ADAMS.

In the trial of an action by a mortgagee against a town clerk for not recording a mortgage of personal property, so that the property was attached and sold on execution by the mortgagor's other creditors, the plaintiff introduced the deposition of the mortgagor, taken under a commission, in which he deposed that he delivered the mortgage to the defendant to be recorded, and paid him his fees, &c. The defendant had filed a cross interrogatory, asking the deponent when he was first informed that the mortgage was not recorded — what steps or measures he took relating to the same — whether he made any communication to the mortgagee respecting the mortgage not being recorded — and what directions he received from the mortgagee in consequence of such communication. A part of the deponent's answer was, that he informed the mortgagee that the property was lost through the carelessness of the defendant, and that there was no way to recover it from the attaching officer, as the mortgage was lost, and there was no copy of it; that he also told the mortgagee that he (the deponent) considered the defendant holden for the payment of it, or bound to make it good; that the mortgagee replied, that he did not wish to go to law; and that nothing more was then said or done about it. *Held*, that this part of the deponent's answer was admissible in evidence against the defendant.

Held also, that the defendant was rightly permitted to give in evidence, for the purpose of discrediting the deponent, a letter written by him, a short time before the mortgaged property was sold on execution, to one of his creditors, who had attached it, saying that he should be in no haste to pay the debt, and would pay no cost, and threatening the creditor with trouble, if he should dare to sell the property on execution.

THIS was an action of trespass upon the case to recover damages alleged to have been sustained by the female plaintiff, while sole, in consequence of official neglect of the defendant, while clerk of the town of Chelmsford, in not recording a mortgage of personal property which the plaintiffs averred was delivered to him for that purpose.

The plaintiffs, at the trial, produced the deposition of Alonzo Cutter, which was taken, September 23d 1840, under a commission, and in which he testified, among other things, that in the autumn of 1834 he owed his mother in law, Mary Lyman, now Mrs. Perkins, one of the plaintiffs, two hundred dollars, and that she at the same time was liable, as indorser for him, for three hundred and ninety dollars which she afterwards paid: That he at that time executed to her, as security, a mortgage of certain patented machinery, of the value of one thousand dollars, and by her directions carried the same to the office of the defendant, who was then town clerk. and where the town records

were then kept, and delivered it to the defendant with orders to record it, and at the same time paid him his fees for recording, which the defendant accepted : That he had no other conversation with the defendant on the subject, until he went to Chelmsford in February or March 1836, for the purpose of ascertaining how his matters stood : That during the last of the fall of 1835 and most of the winter of 1835 and 1836, the witness was confined by sickness in the State of Maine, where he was when he first learned that said machinery had been attached on writs issued against him : That when at Chelmsford in February or March 1836, he asked the defendant for the mortgage, who replied that it had never been recorded, and that he supposed that it was lost, destroyed or burnt up, as he had not seen it since it was left with him, and he supposed it was settled.

The witness further deposed that his said mother in law was residing at his house in Chelmsford, at the time said mortgage was given, and that in the spring of 1835, she married to her present husband and removed to Amherst, where she has since resided : That he (the deponent) resided in Chelmsford till about October 1835, when he went to the State of Maine, and intended to have removed the machinery there if it had not been attached ; and that by the terms of the mortgage he was entitled to the possession of the machinery, and that his right to the possession and use of it had not expired on the 2d of April 1836.

It was proved that the defendant, in November or December 1835, filled four writs, as the attorney of William Fletcher, jr. and others, creditors of said Alonzo Cutter, and caused said machinery to be attached on the same ; that judgments were rendered in said suits, at the March term of the court of common pleas, 1836 ; and that said machinery was sold on the executions which issued on the same, dated April 2d 1836.

The defendant propounded the following cross interrogatory, among others, to said Cutter. " When were you first informed that the mortgage was not recorded ? and what steps or measures did you take in relation to the same ? did you make any communication to your mother in law respecting said mortgage not being recorded ? and when and where did you first make

any such communication? who was present at the time? and what directions did you receive from your mother in law in consequence of such communication? what measures did you pursue in consequence of such information that such mortgage was not recorded?"

"To the third cross interrogatory the said Alonzo Cutter answereth and saith, that the first information I had that said mortgage had not been recorded was when I returned to Chelmsford in February or March 1836. [When I returned to Amherst where my mother in law resided, I informed her that the property was lost through the carelessness of Adams in not recording the mortgage, and that there was no way to recover it from the attaching officer, as the mortgage was lost and there was no record copy of it. At the same time, I told her that I considered Mr. Adams holden for the payment of it, or bound to make it good. She told me she did not wish to go to law; and nothing more was said or done about it at that time.] I do not recollect that any one was present at the time."

The court ruled that the portion of the foregoing answer, which is inclosed in brackets, was incompetent, and rejected it.

The defendant contended that the testimony of said Cutter was false and that the mortgage was never delivered into his hands with orders that he should record it, but that he received it to hold, and not to record until further orders; and that he never received any further orders.

It appeared that Cutter, as soon as his health would permit, went from the State of Maine to his father's in Warren, (Mass.) where he remained until he came to Chelmsford and saw the defendant. And there was no evidence that he had any communication with his mother in law previous to his writing the letter, hereafter mentioned, to William Fletcher, jr. It also appeared that the Mr. Gardner, spoken of in said letter, had been in said Cutter's employ in Chelmsford, and was taking down and packing the machinery for the purpose of carrying it to Maine, when it was attached in November or December, 1835.

The letter, of which the following is a copy, was offered by the defendant, for the purpose of contradicting the deposition of

said Cutter. The plaintiffs objected to the admission of the letter in evidence, but the court admitted it.

“Warren, February 23d 1836.

“Sir. Your letter under date the 5th inst. is this day received, and in answer I would just say, had you not have sued me, the debt would have been paid months ago by my brother in Boston ; but as you have conducted as you have, I shall not be hurried to pay it, I assure you. But still I do n’t wish to be understood that I do n’t mean to pay ; for if my life is spared, I shall pay all my honest debts, but no cost. Perhaps you think I am plain, but I mean to be so, after being treated as I have been by you during my sickness. I would not have treated a dog as you have treated me. I have been informed that you have attached the machinery ; if so, and you sell them, you will have difficulty ; as Mr. Gardner has been here and informed me the whole story, and I have consulted a lawyer, and he says that if you cause them to be sold on execution unboxed, it will cause you trouble and liable to a heavy damage. If you dare risk it, go on with your play, and see if you do n’t get your money’s worth.

A. Cutter.

“P. S. I do not wish to give any persons trouble, unless they trouble me. I should advise you as a friend to keep still if you want your money.”

This letter was directed to “Capt. William Fletcher, jr. Chelmsford, Mass.” and was mailed on the 27th of the same February. Said Fletcher was first attaching creditor of said machinery.

A verdict was returned for the defendant.

New trial to be granted, if that part of Cutter’s deposition, which was excluded, ought to have been admitted, or if his letter, which was admitted, ought to have been excluded.

Farley & G. Parker, for the plaintiffs.

L. Williams & Mellen, for the defendant.

HUBBARD, J. A new trial is moved for in this case, by the plaintiffs : 1st. Because a part of the answer of Alonzo Cutter, a witness whose deposition was taken by the plaintiffs, to one of the defendant’s interrogatories, was not permitted, by the pre-

siding judge, to be read in evidence to the jury. 2d. Because he admitted a letter of said Cutter to William Fletcher, jr. to be read to the jury.

The witness was asked what measures or steps he pursued ; whether he made any communication in relation to the mortgage not being recorded ; and what directions he received in consequence of such communication. And the objection is to his conversation with his mother in law, the mortgagee, and one of the plaintiffs.

He was certainly bound to tell the steps which he pursued, and the directions which he received ; and we think what he stated at the time to the party was a part of the steps he pursued, was responsive to the general inquiry, and that the answer, on the whole, would be incomplete without the conversation as constituting a part of the communication. If the witness had stated that he did make a communication, without stating what it was, it might have been argued that he withheld it, because it would be unfavorable to the plaintiffs, and so the plaintiffs would have been prejudiced.

A witness may always be subjected to a strict cross examination, as a test of his accuracy, his understanding, his integrity, his biases, and his means of judging. But the party who puts the questions must risk the answers, and if unfavorable to him, he cannot, for that cause merely, reject them, but if favorable, retain them. We think the whole answer should have been admitted. If the part rejected had been, in our opinion, immaterial to the issue, we should not have deemed the rejection of it a cause for a new trial ; nor if the things testified to were proved satisfactorily by other testimony. But it appears to us that the answer is of some importance in its bearing on the issue, in respect to matter not proved by other witnesses. The verdict therefore must be set aside and a new trial granted.

In relation to the letter of the witness to Fletcher, the admission of which was objected to as not contradicting the witness, we think it relates to the subject in difference between the parties ; and as its tendency might have been to discredit the witness, we are of opinion that it was rightly admitted.

BENJAMIN F. BUTLER vs. DEXTER HILDRETH.

An assignee of an insolvent debtor, under *St.* 1838, c. 163, may affirm a sale of goods made by such debtor for the purpose of delaying or defrauding his creditors, and receive the price of the goods from the vendee. And if such assignee, knowing all the facts of the case, brings an action against the vendee, on a note given by him for the price of the goods, and secures the demand by an attachment of his property, he thereby so far affirms the sale, and waives his right to disaffirm it, that he cannot, by discontinuing such action and demanding the goods, entitle himself to maintain an action of trover against the vendee, on his refusal to return them.

THIS case came before the court on the report of *Pulnam, J.* before whom a trial was had in December 1841.

Butler, pro se.

J. G. Abbott, for the defendant.

SHAW, C. J. The plaintiff is assignee of Messrs. Thurston and Pickering, insolvent debtors, under the insolvent law of 1838. This action is trover to recover the value of a quantity of goods, sold by the insolvent debtors to the defendant, some months before the proceedings under the insolvent law were commenced, and for which the defendant gave his promissory notes, payable on demand. These notes came into the plaintiff's hands, as part of the effects of the insolvent debtors, and were produced at the trial, and put on file, to be delivered up to be cancelled, if the plaintiff prevails in this suit.

It is stated in the argument for the defendant, that the notes were not all delivered up, but that the defendant had paid some of them. This statement contradicts the report, and we must take the report as our guide.

The plaintiff claims the goods for the benefit of the creditors of the insolvents, on the ground that they had been fraudulently conveyed to the defendant, in order to delay and defraud their creditors, and that therefore the sale was void as to creditors, and that the plaintiff, as the representative of the creditors, had a right to avoid it, and reclaim the goods specifically. If he had such right, as we presume he had, on proving such fraudulent conveyance, a refusal on the part of the defendant, to deliver them, when demanded, would amount to a conversion, on which this action of trover would lie. Then the question is,

whether the plaintiff has waived his right so to avoid the sale, reclaim the goods, and maintain an action of trover, on the refusal of the defendant to deliver them, by the fact, that before he commenced this action he commenced an action against the defendant, on the notes given for the goods, made the usual affidavit that the notes were due, and caused property to be attached to secure the payment of them. The action on the notes was commenced February 3d 1841, but was never entered. The present action was commenced March 28th 1841. Upon this case the jury were instructed, that if the plaintiff, at the time he sued the notes, knew all the facts — as he did afterwards, when he commenced this action of trover — tending to show that the sale was fraudulent and void, it was to be considered in law as a ratification of the sale, and that in such case this action could not be maintained. The cause went to the jury under this instruction, and they returned a verdict for the defendant.

In order to test the correctness of this direction, it is necessary to consider what the rights of the plaintiff were, when he thus became the assignee of these insolvent debtors. We assume, for the purpose of this inquiry, that he had the right, in behalf of creditors, to set aside this conveyance, if in fact it was made to defraud creditors. But such a conveyance is not *ipso facto* void ; it is valid as between the parties ; it is binding upon the purchaser, and he could not avoid the payment of his notes on that account. It can be avoided only by the creditors, or one representing creditors. But circumstances may be such, that it may not be for his interest to avoid such sale, but on the contrary to affirm it. Suppose the fraudulent character of the transaction consisted in this, that the debtor intended to sell his goods, and the purchaser to buy them for the express purpose of preventing an immediate attachment, by substituting for goods open to attachment, promissory notes not capable of attachment. Should these notes afterwards come into the hands of an assignee, it might be more beneficial for the creditors, to collect the notes, which would affirm the sale, than to disaffirm the sale and repudiate the notes. The assignee has an *election*, not of

remedies merely, but of rights. But an assertion of one is necessarily a renunciation of the other. This results from the plain and very obvious consideration, that the assignee cannot affirm the sale in part, and disaffirm it in part ; if it is to stand as a valid sale, the property of the goods remains vested in the purchaser, and he remains liable for the price. But if the sale is avoided and set aside, it stands as if it had never been made ; the property may be taken possession of by the representative of the creditors, as if no sale had been made, and the purchaser ceases to be liable for the price. When therefore the assignee has made that election, if he receives or demands the price, it is equivalent to an express declaration that he does not impeach the sale, and has no claim to the goods. But if he takes possession of the goods, or demands them of the purchaser, on the ground that the sale was void as to creditors, it is equivalent to a renunciation of all claim for the price.

We are then brought to the question, what act on the part of the assignee is to be taken as proof of his election. It would, we think, be going too far to say, that merely demand of the price should be deemed a waiver of his right to avoid the sale, and claim the goods ; because, in many cases, if the price could be obtained, it would be equally beneficial to the creditors, and he would have no farther occasion to pursue the harsher remedy of impeaching the sale. But we think that if the assignee commences an action against the purchaser for the price, and causes his property to be attached to secure it, this is a significant act, an unequivocal assertion that he does not impeach the sale, but by necessary implication affirms it. It is an act too, deeply affecting the rights of the purchaser, whilst it is an assertion of his own ; and if done with a knowledge of all the facts, which ought to influence him in his election, it is conclusive.

But this determination will not extend to a case where facts subsequently come to the knowledge of the assignee, which, if he had known them before, would have led him to a different election—whether these facts relate to the character of the sale, and bear upon the question whether it was fraudulent or not, or whether they relate to the remedy. As if the assignee.

on commencing his action for the price, believes that he has secured the amount due, by a valid attachment of the defendant's property, and afterwards discovers that it is not the property of the defendant, and that his supposed remedy has failed. Or if he should discover that the defendant had an offset, which would be good against an action of assumpsit for the price, but not good against an action of trover. If, on any of these grounds, it should appear that he had made his election under a mistake of facts, and more especially if he had been led into such mistake by the adverse party, it might present the question in a different view. But no mistake of fact of any kind was suggested in the present case, nor precluded by the directions of the judge.

The case where a party is not barred, by a judgment of nonsuit, from having a new action, is where he has either mistaken his remedy, and brought an action which he could not maintain; or where he has two collateral, independent remedies, in which an assertion of one is not repugnant to the existence of the other. Of the former class is that of *Nightingal v. Devisme*, 5 Bur. 2589, cited in the argument. The assignees of a bankrupt brought an action for money had and received, to recover the value of East India stock, claimed to be the property of the bankrupt, and misapplied by the defendant after an act of bankruptcy. The court decided that the action would not lie, but intimated that perhaps another action might be brought, which would meet the case. Here was no case for an election of remedies, where the adoption of one would exclude the other. It was simply a mistake of his remedy by the plaintiff.

Of a similar character is the case of *Peters v. Ballistier*, 3 Pick. 495, which at first view seemed like the present. The plaintiffs first brought an action of assumpsit, which they discontinued, and afterwards brought trover, which they maintained. But the decision proceeded on the ground that the plaintiffs had, in the first instance, misconceived their remedy and could not maintain an action of assumpsit; that they had no election to make, and could only recover against those defendants in an action of trover, relying on their legal title to the property, and a conversion by the defendants. In case where there are two

independent and collateral remedies, not inconsistent with each other, a party is not barred, by discontinuing one, from commencing a new action on the other. A man may have trespass or replevin for the same goods; but the one right is not repugnant to the other. We do not see why he might not discontinue one and commence the other, at any time before he has proceeded to judgment.

It was insisted, on the part of the plaintiff, that the defendant relies upon matter in nature of an estoppel, and that a party can only be estopped by his own act, or the act of one with whom he is privy. In this case, the act, relied upon by the defendant to bar the plaintiff, is his own act in bringing a prior action on the notes. But we presume the argument is this; that as the transaction to be drawn in question in this case, touching the validity of the sale, was between the insolvents and the defendant, it was not a transaction to which the plaintiff was party, and therefore he ought not to be presumed to be conversant with all the facts respecting it, as if they had passed under his own observation. This is very true; but this consideration is fully embraced in the instruction which was given to the jury. It was only in case the plaintiff, when he commenced the first action, knew all the facts touching that transaction, which he knew when he commenced the second, that he was to be barred. His not being personally conversant with the transactions only rendered it less probable that he was acquainted with them; but if he was in fact acquainted with them, whether he acquired his knowledge from personal observation or from information would make no difference. On the whole, the court are of opinion, that the direction of the judge was right, and that the defendant is entitled to

Judgment on the verdict.

NATHANIEL WATSON vs. INHABITANTS OF CHARLESTOWN.

Where an insane person, who is not able to pay for his own support, is confined in a house of correction, under *St. 1836, c. 223*, the town in which he has a settlement is liable for his support in such house, if he have no parent, master, or kindred, liable by law to maintain him.

SHAW, C. J. This is an action of assumpsit by the master of the house of correction in this county for the support of several insane persons, who had their legal settlement in the town of Charlestown. It appears by the facts agreed, that the plaintiff was such master ; that the several persons were duly ordered to be confined to said house, as persons insane, but not furiously mad, and were there supported and maintained ; that the plaintiff's account was properly audited ; that the respective insane persons were unable to pay for their own support ; that neither of them, respectively, had any parent, kindred, master or guardian, liable by law to support them ; and that demand was made on the overseers of the poor of the defendant town, more than thirty days before this action was brought. The question is, whether the defendant town is liable. This depends on *St. 1836, c. 223*. This statute directs, that apartments shall be provided, in the house of correction in each county, for the reception of idiots and lunatics, to be sent there in the manner directed. It directs that provision shall be made for their comfortable support, and that they shall be employed and governed in such manner as the county commissioners may judge best ; and that such sum shall be allowed for their support as the commissioners shall direct : And then it enacts, that if "there shall be no parent, kindred, master, guardian, town or city, obliged by law to maintain the person so confined, the sum allowed as aforesaid shall be paid out of the treasury of the Commonwealth."

This provision, if it stood alone, would convey a strong implication, that if there be any parent, master or town, liable for their support, then the remedy is to be had against such parent or town. The town intended in this clause is explained by the succeeding section, in which, in reference to the same subject,

it is described as the "town or city in which such person may have a legal settlement."

But the court are of opinion, that the liability of the defendants does not stand merely on this implication. The act itself recognizes the previous existence of the house of correction, and laws and regulations to govern it. It was not the creation of a new establishment of a distinct county asylum for the insane; but it was designed to appropriate a department of a county house already established, for purposes in some measure analogous. It therefore necessarily referred to those existing laws and regulations, so far as they were applicable, without repeating them in detail. In an opinion, given at the request of the House of Representatives, 1 Met. 572, we had occasion to review these acts, and we came to the conclusion, that those persons who were sent to the house of correction as vagrants or vicious paupers, for employment and reformation, were to be supported as paupers by themselves or their kindred, or the town of their legal settlement; and that those who were sent there as convicts, for the punishment of their offences, were to be supported by the Commonwealth. In the case of vagrants, the Rev. Sts. c. 143, § 16, expressly authorize the keeper of the house of correction to maintain an action against the town where such person has his legal settlement, in case he is not himself able to pay, and no other person is liable. *Boston v. Westford*, 12 Pick. 16. *Robbins v. Weston*, 20 Pick. 112. *Boston v. Weston*, 22 Pick. 211.

It appears to us, that the legislature, in providing for adding this additional department to the house of correction, had reference to these preëxisting laws. These idiots and insane persons are certainly not convicts, or confined for punishment. Strictly, they are not vicious persons, requiring correction and amendment; but they are poor and unfortunate persons, requiring a species of regimen and management which ordinarily cannot be had at almshouses. But we think it was not the intention of the legislature, in providing a more suitable place of retreat and relief for these unhappy persons, to alter the existing liability for their support, but to leave it, where it existed be-

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fore, upon the town of their legal settlement, if there was no one subject to a prior liability, as established by the law *in pari materiâ*. Upon the facts agreed, the court are of opinion, that there must be

Judgment for the plaintiff.

E. R. Hoar, for the plaintiff.

Hopkinson, for the defendants.

HIRAM D. FREEMAN *vs.* CITY OF BOSTON.

The mayor and aldermen of the city of Boston passed an order, "that a reward of \$500 be offered to any person who shall give information, so that any person shall be convicted of setting fire to any building, for the purpose of burning the same:" An advertisement was inserted in the city newspapers which were published on the next morning after said order was passed, reciting that sundry houses and other buildings had been recently set on fire, and offering a reward of \$500 to any person "who shall give information, so that any perpetrator of these outrages shall be convicted:" This advertisement purported to be "by order of the mayor and aldermen," and was signed by the city clerk.

Held, that the advertisement must be taken to be the official act of the mayor and aldermen. *Held also*, that the order and the advertisement were to be construed together, as parts of the same transaction, and that by the true construction thereof, the reward was offered for information that would lead to the conviction of offences previously committed, and not offences thereafter committed.

ASSUMPSIT to recover a reward offered by the defendants. At the trial in the court of common pleas, before *Strong*, J. the plaintiff gave in evidence the vote of the mayor and board of aldermen of the city of Boston, and the advertisement, signed by the city clerk, which are hereinafter set forth in the opinion of the court. He also introduced evidence that the city clerk, by order of the mayor and aldermen, caused said advertisement to be published in the Boston Courier, and Boston Daily Advertiser, (two newspapers in Boston,) on the 20th of October 1835; also that a dwellinghouse was set on fire, in Boston, on the night of the 22d of the same October; that the plaintiff gave the first information that Stephen Russell and Simeon L. Crockett set said fire, and pointed them out to be arrested by the proper authorities; that said Russell and Crockett were arrested and brought to trial for said offence; that the plaintiff was a witness, and

gave important testimony, at said trial ; and that, in consequence of said information and testimony, given by the plaintiff, said Russell and Crockett were convicted of said offence.

Upon this evidence, the judge ruled that the defendants' offer of a reward related only to the previous fires referred to in the advertisement : Whereupon the plaintiff was nonsuit, but alleged exceptions to said ruling.

Wellington, for the plaintiff.

Hopkinson, for the defendants.

SHAW, C. J. This is an action of assumpsit against the city of Boston, to recover a reward of \$ 500, for giving information of persons who had been guilty of setting fire to dwellinghouses. The plaintiff claims this, on the ground, that after the offer of a reward by the mayor and aldermen, in the manner hereinafter stated, he gave such information as to lead to the detection, trial and conviction of one Russell and one Crockett.

The principle, on which the action is brought, is now well settled. It is this : The offer of a reward or compensation, either to a particular person or class of persons, or to any and all persons, is a conditional promise ; and if any one to whom such offer is made shall perform the service, before the offer is revoked, such performance is a good consideration, and the offer becomes a legal and binding contract. Of course, until the performance, the offer of a reward is a proposal merely, and not a contract, and therefore may be revoked at the pleasure of him who made it. A leading case, on the subject of an action on the offer of a reward by public advertisement, is *Symmes v. Frazier*, 6 Mass. 344. But as it is entirely optional with the person offering a reward, to do it on such terms as he pleases, and as the contract depends wholly upon the offer on one side and the performance on the other, without other communication between the parties, the legal import and effect of the contract must be determined by the terms of the offer, fairly construed according to the intent of the party making it. In the case cited, it was held that an offer of a specific reward, for the recovery of a certain sum of money lost, ought, unless specially limited, to be construed to be an offer of a

proportional part of the reward, for the recovery of a part of the money lost.

In the present case, the plaintiff relies upon two documents, as evidence of the offer of a reward, on the part of the city ; and as there is some supposed difference in their terms, it becomes necessary to consider them both, and compare them. On the 19th of October 1835, the mayor and aldermen passed a vote to the following effect : “ At a meeting of the board of aldermen, it was ordered, that a reward of \$ 500 be offered to any person or persons, who shall give information, so that any person shall be convicted of setting fire to any building, for the purpose of burning the same.”

It was further proved, that on the morning of the next day, October 20th 1835, by direction of the mayor and aldermen, an advertisement was published in several of the Boston papers, to the following effect : “ Whereas sundry houses and other buildings have been recently set on fire, by some evil minded person or persons, thereby destroying the property and endangering the lives of the inhabitants of this city, therefore, in pursuance of a vote of the mayor and aldermen, a reward of five hundred dollars is hereby offered to any person or persons, who shall give information so that any perpetrator of these outrages against the persons and property of the community shall be convicted. By order of the mayor and aldermen. S. F. McCleary, city clerk.”

The incendiary act, of which the plaintiff gave information, occurred on the night of the 22d of October, a short time after the vote and advertisement offering a reward.

The question is, whether this offer extends to information to be given, in relation to incendiary acts to be perpetrated in future, after the reward offered, or whether it was limited to acts then past, the detection and punishment of which were contemplated by the offer. The plaintiff contends, that the vote itself, independently of the advertisement, constituted the offer of a reward ; that as the votes and proceedings of the board of aldermen, acting in their official capacity, are by the charter to be public, every person may be considered as cog-

nizant of their acts, when passed and recorded, without further publicity ; that the plaintiff has a right to rely on the vote thus passed, without reference to the advertisement ; and that by this vote there is no limit to the offer, confining it to information of past acts, rather than future ones. On the part of the defendants, it is insisted, that the vote and the advertisement are to be considered and construed together ; that the preamble to the advertisement, having recited several incendiary acts then recently committed, and the reward offered being for information leading to the detection of any perpetrator of " these outrages," limits such offer to past acts ; and that it would be alike contrary to the terms of the offer, and to the dictates of sound public policy, to construe it as the standing offer of a large reward for the detection of a class of crimes to be afterwards committed, without limit of time.

The court are strongly inclined to the opinion, that an act of the board of aldermen, duly made and recorded, may be considered as a complete and definitive act, when it is intended so to be ; and that the publicity of their proceedings would be regarded as constructive notice to those concerned, when such notice would suffice. But there are two considerations here, which induce us to believe, that the vote ought not to be regarded as an independent offer, distinct from the advertisement. The first is, that the vote itself does not purport to be a definitive act, but contemplates that something further was to be done. It does not state that a reward is hereby offered, but that a reward " be offered," that is, as we understand it, be notified and presented to the public, to any and all persons, by some suitable and authentic announcement, to be published. The other consideration is, that the advertisement was simultaneous with the vote ; that it was equally the official act of the board of aldermen ; that the two manifestly relate to each other ; and by a well known rule of construction, they are to be taken as parts of the same transaction, and are to be construed together, in determining the quality of such transaction.

The vote was passed on the 19th of October, and the advertisement, being published in the morning papers of the 20th,

must have been sent on the day or evening previous ; which shows that the passing of the vote, and the signing of the advertisement by the city clerk, were on the same day. And this advertisement was the official act of the board of aldermen. It was argued, that the vote was an authority to the clerk, to issue the notice, and that the notice itself was the act of the clerk, executing such authority. One argument drawn from this view of the two documents was, that if there was any variance between the advertisement and the vote, it was without authority on the part of the clerk, that the vote alone must govern. But it does not purport to be the act of the clerk, nor is any authority conferred by the vote on the clerk, to do such act. It purports to be the official act of the board of aldermen, verified and authenticated by the signature of the clerk ; and when so verified, it must be taken to be their act.

Taking the vote and the advertisement together, with the recital, in the latter, of sundry houses and buildings having been recently set on fire, the court are of opinion, that the offer of a reward was confined to the detection of the perpetrators of these offences, which had been then recently committed. They were of a known character and degree of aggravation, as done in the night time, or otherwise, destroying or endangering dwellinghouses, or otherwise. Had the city government intended to make a standing offer of a reward for the detection of future incendiary acts — the policy of which, to say the least, would be very questionable — we think it would have been much more precise and guarded in its terms, and limited to some term of time. As an offer for the detection of future acts, it would, as it stands, be limited to no species of building, and to no time of day. The burning of a detached shop, of the value of \$ 50 or \$ 100 in the day time would be within its terms. Such, we think, was not the intent of the board of aldermen, nor was such the legal effect of their acts.

The court are therefore of opinion, that the plaintiff has not brought himself within the terms of the offer, by doing any act for which the reward was offered, and that his action cannot be maintained.

A doubt was suggested, whether the board of aldermen, by their general powers, or otherwise, had authority to bind the city by such an offer of a reward, for the detection of incendiaries ; but this is a point which we have had no occasion to consider.

Exceptions overruled.

MICHAEL SHUTE vs. ROBERT TAYLOR.

A. bound himself by bond, "in the full and just sum of \$ 500, liquidated damages, to convey to B. on demand 3000 feet of land in a city, on the corner of L. and M. Streets, including a certain house and shed, and afterwards, on B.'s demand, executed a deed to him, conveying a lot of land, described by metes and bounds, at the corner of said streets, with the buildings thereon standing : B. accepted the deed, and he and A. agreed that if it was not right, it should be made right : It was afterwards found upon a survey of the land thus conveyed, that it did not include the shed mentioned in the bond, and that it contained only 2513 feet. *Held*, in an action by B. on the bond, that he had not waived his claim for a conveyance of 3000 feet, and that he was entitled to maintain his action without making another demand for a deed. *Held also*, that as B. had accepted a deed in part performance of the bond, the sum of \$ 500 was not to be regarded as liquidated damages, but that he was entitled to recover only the actual damages which he had sustained.

THIS was an action of debt on a bond dated April 1st 1841, "in the full and just sum of \$ 500, liquidated damages," conditioned that the defendant should convey to the plaintiff, by deed of warranty, "on his request or demand, 3000 feet of land situated in Lowell, on the corner of Lawrence and Middle Streets, beginning at the northeasterly corner of said land, at the corner of said streets ; thence running southerly on Lawrence Street to a line from said street westerly and parallel with said street, and by the southerly side of a dwellinghouse standing thereon ; thence westerly on a line from said street drawn as aforesaid to land late of Henry Fletcher ; thence northerly on said Fletcher's land to Middle Street ; thence easterly on Middle Street to the point of beginning ; with all the buildings situated on and within said described premises, and all for the sum of \$ 1300," [to be paid at different times mentioned in the condition of said bond.] At the end of the condition was

this clause: "The buildings on said land mentioned above, that I mean to convey, are a house and shed now occupied by Luther Davis."

The parties submitted the case to the court on the following facts agreed: On the 8th of April 1841, the plaintiff went to Methuen, where the defendant resided, and requested the defendant to convey to him the land described in said bond. A scrivener was called in, a plan was produced by the defendant, and the plaintiff and defendant requested the scrivener "to strike off 3000 feet from the plan, and make a deed accordingly." The scrivener made a deed accordingly, remarking that the plan was old and wrinkled, and there might be a variation from the true quantity; but that he believed it was right. The deed was read, and the plaintiff and defendant agreed that if it was not right, they would ~~make~~ it right. In this deed, the land was stated to be situate at the intersection of Lawrence and Middle Streets, and was described by metes and bounds, and as "containing 3000 feet by measure, with the buildings thereon standing." The plaintiff received the deed, without any objection, and it was agreed that he should take possession from the 1st of April — the date of said bond. As the plaintiff stated that "he was going away, to be gone most of the summer, there was an understanding between the parties that when he returned he was to let the defendant know, and they were to get the land surveyed. The object of the survey was not stated. Something was said about fixing bounds, and the witness, who heard the conversation, understood they were to fix the bounds when they should survey."

The shed mentioned in the bond was removed, "about its width," from the defendant's land, and placed upon the land of one Fletcher, in the year 1837; and when said deed was given, it was on said Fletcher's land, and was used with the house mentioned in the bond. The nearest part of the shed, after it was removed, and when said deed was given, was about 20 feet from the house, and there was no fence between the shed and the house.

The plaintiff went upon the premises, to examine them, be-

fore the said bond was given ; and the defendant, at the time of giving the bond and the deed, owned land enough on the southern side of the land described in the deed, to make up the quantity of 3000 feet. The said deed from the defendant to the plaintiff included the house aforesaid, but not the shed ; and the lot on which the shed stood adjoined, on the west, the land included in the deed. The defendant knew, when he executed the bond and the deed, that the shed was not on his land.

The plaintiff sent a written notice to the defendant, requesting him to attend, on the 17th of August 1841, at a survey of the land ; but the defendant, being absent from home, did not receive it in season to attend. The plaintiff afterwards gave the defendant a written notice to attend at a survey, on the 21st of said August ; at which time the defendant went to Lowell, but found that the surveyor, named in said notice, was absent and would not return in season to survey the land. On the 23d of said August, the said surveyor (the defendant being present) made a survey of the land conveyed by the defendant, and found the contents to be 2980 feet, "taking Lawrence Street as it formerly stood." The plaintiff afterwards procured a survey to be made of the same land, by another surveyor, by which it appeared that the quantity of said land was 2513 feet. And it is agreed by the parties that this was the true quantity, "as Lawrence Street now stands."

Lawrence Street was, originally, as it was marked on the plan used by the scrivener when he marked off the 3000 feet on the plan used by him when he wrote the deed ; "and the defendant thought he had complied with the condition of the bond, when he gave the deed, so far as respects the quantity of land." But Lawrence Street was altered by the county commissioners, in 1837, so as to make said last survey correct as to the contents of the land, described in the defendant's deed to the plaintiff.

The plaintiff paid to the defendant the sum mentioned in said bond, at the times therein mentioned ; but he made no demand on the defendant for a deed, besides that which was made when the deed was given on the 8th of April 1841.

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It was agreed that the court should render judgment for the plaintiff or for the defendant, as the law on the foregoing facts might require; and that if the plaintiff were entitled to judgment, and the said sum of \$ 500 were not liquidated damages, an assessor might be appointed to assess the actual damages.

H. H. Fuller & Morse, for the plaintiff.

Wentworth, for the defendant.

SHAW, C. J. The first question which arises in the present case is, whether the facts agreed show a breach of the bond declared on. The defendant insists that he has complied with the condition of his obligation, by executing a conveyance of land lying at the corner of Lawrence and Middle Streets, which the plaintiff accepted as and for the conveyance stipulated for in that obligation. But upon comparing the deed, thus given, with the bond, it appears that although the land is described as being at the corner of Lawrence Street, the dimensions, as given, instead of 3000 feet, amount to a little over 2500 feet, and that the conveyance does not include the shed which is one of the buildings contemplated in the obligation to be conveyed. This deed then independent of all evidence as to the fact of execution, delivery and acceptance, would plainly not be a compliance with the obligation. This obligation is peculiar. Sometimes when a deed specifies the number of feet or acres in a tract, or when a bond is given for a deed of a particular lot of land definitely described, and the number of acres or feet is expressed, such description is rather regarded as a second or explanatory description, still further to identify the lot; and then the number of acres or feet is not regarded as of the essence of the contract. But when land is purchased by the square foot, in a city, and the undertaking is to convey a specified number of feet out of a larger parcel, then the number of feet to be conveyed is of the essence of the contract, and the consideration is to be apportioned accordingly. Taking it in this view, it is very manifest that an actual conveyance of 2513 feet is not a compliance with an agreement to convey 3000 feet.

Then, however, it is contended, that this deed, when accepted, was taken as a full performance, and that any other perform

ance was waived. But whence is this inference drawn? That the taking of a deed is so far an acceptance, as to vest the estate in the vendee, is obvious; but how is it to operate as the satisfaction or performance of a particular obligation? This inference cannot be drawn from the naked, unqualified acceptance of the deed — which is all that is shown. In order then to prove that this deed was in fact accepted as and for a performance of this contract, the defendant is compelled to resort to evidence *aliunde*, and to show what was the purpose of the execution and acceptance of the deed, as declared and understood at the time. But by a well known rule of law, when evidence *aliunde* is resorted to by one party, the other party has a right to the proof of all that was said and done at the same time. This lets in evidence of all that took place at Methuen, when this deed was given. Upon this evidence, taken all together, it will appear that the acceptance of the deed, so far from being absolute, unqualified and unconditional, was qualified and conditional, and that it was accepted under an agreement, that it was to enure as part satisfaction, or entire satisfaction, as it should or should not turn out, upon a survey to be made, that it was a full compliance. The defendant then agreed to attend such survey, and the statement was, that if it was not right, he would make it right. This, as an agreement or promise to make a further conveyance, would be inoperative and void, under the statute of frauds, because it would be a parol promise to convey lands. This is not the promise, on which the plaintiff does or can rely to maintain an action. But he holds the agreement of the defendant, in a binding form, to convey 3000 feet. The declaration of the defendant, that if not right, he would make it right, affects the external act of acceptance and delivery, and goes to show that that deed was not accepted in full performance, but only in part of performance. It is *res gesta* which qualifies the act of acceptance.

It is now stated that this mistake occurred in consequence of the limits of Lawrence Street having been changed, and a part of the lot, formerly belonging to the defendant, taken into the street, and that the defendant, without adverting to this consid-

eration, made his deed by a description applicable to the street as it formerly was, but not applicable to the street as it was enlarged and established. But if this was a mistake, it was not one for which the plaintiff was responsible. The obligation of the defendant was executed after the street had been altered and established by the proper officers of the county. He was bound to know, and probably did know of such alteration. At all events, his obligation adopted the corner of the two streets as the starting point, and did apply to the street as it was then established; and the duty and obligation which he took upon himself was, to execute a deed conformably to the description as thus determined. The deed, as executed, was only a part performance and not a complete execution of such agreement, and the acceptance was a modified and not an absolute acceptance. Therefore the court are of opinion that there was a breach of the bond.

Then an objection is taken, that even supposing the defendant might be bound to a further execution, yet as the effect of his obligation was to perform, by giving a deed on demand, when he had given one deed on demand, that demand was exhausted, and he could not establish a breach without a new demand. There seems to be some plausibility in this point; but upon consideration, we are of opinion that it is not a valid objection. When once a demand was made, the duty of the defendant to make a complete conveyance, a complete performance of his undertaking, was fixed. It was as much for his interest, and as much his duty, to obtain an accurate survey, as it was that of the defendant. The attempts to meet each other, for a mutual survey, and the failure of those attempts, may have been unfortunate for both parties, but it imposed no new duty on the plaintiff. After one demand for a deed conforming to the obligation, the defendant was bound at his risk to execute such a deed, and no new demand was necessary to establish this obligation.

On the subject of damages, it is insisted for the plaintiff that the \$ 500 is stated, in the obligation, to be liquidated damages, and that the plaintiff is entitled to the full amount without any

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apportionment. The question, what is liquidated damages, and what a penalty, is often a difficult one. It is not always the calling of a sum, to be paid for breach of contract, liquidated damages, which makes it so. In general, it is the tendency and preference of the law, to regard a sum, stated to be payable if a contract is not fulfilled, as a penalty and not as liquidated damages ; because then it may be apportioned to the loss actually sustained. But without going at large into the subject, one consideration, we think, is decisive, against recovering the sum in question as liquidated damages, namely, that here there has been a part performance, and an acceptance of such part performance. If the parties intended the sum named to be liquidated damages for the breach of the contract therein expressed, it was for an entire breach. Whether divisible in its nature, or not, it was in fact divided by an offer and acceptance of part performance. It is like the case of an obligation to perform two or more independent acts, with a provision for single liquidated damages for non-performance ; if one is performed, and not the other, it is not a case for the recovery of the liquidated damages. See Chit. Con. (5th Amer. ed.) 863-868. *Hoag v. McGinnis*, 22 Wend. 163.

Conformably to the agreement of the parties, an assessor may be appointed, to assess the actual damage sustained by the plaintiff.

ALEXANDER COOLIDGE vs. NICHOLAS H. BRIGHAM.

A. agreed to deliver to B., in part payment of a debt, the note of W. indorsed by two other persons, and afterwards wrote to B. this letter — "I enclose you the note of W.'s, indorsed as proposed, which you will please pass to my credit." *Held* that this was a warranty that the indorsements on the note enclosed in the letter were genuine.

Where a defendant is served with notice to produce his books on the trial, and he refuses so to do, his pass books, containing an account of his dealings with the plaintiff, in which the entries were made by two of his clerks, and were always open to his inspection, are admissible in evidence against him, on the testimony of one of the clerks that the entries, therein made by himself, were accurate, and on proof that the other clerk is not within the jurisdiction of the court.

In an action for the breach of a warranty that the signature of an indorser on a note transferred to the plaintiff by the defendant was genuine, the plaintiff is entitled to recover, as part of his damages, the costs incurred by him in an unsuccessful suit against the supposed indorser, if the plaintiff commenced such suit in good faith, not knowing that such signature was forged, and gave the warrantor reasonable notice of the pendency of the suit, and requested him to furnish evidence of the genuineness of the signature.

In an action of assumpsit the plaintiff alleged that the defendant, on the 28th of April 1837, was indebted to him in the sum of \$ 500 for goods sold ; that the defendant, in consideration that the plaintiff would receive, in part payment for said goods, a note for \$ 306, dated Feb. 16th 1837, signed by G. C. Whitney and payable to G. Whitney or order, in four months, and indorsed by the payee and by D. M. Whitney, promised the plaintiff that the signatures of said indorsers were genuine, and that the plaintiff, relying on the aforesaid promise, received said note and passed the same to the defendant's credit, in part payment for said goods, yet that said signatures were not genuine, but were forged. The trial was before *Putnam, J.* who made the following report thereof:

The plaintiff, to prove that the defendant was indebted to him, as alleged, called J. Brown as a witness, who testified that he was, and ever since 1837 had been, a clerk of the defendant, and that he and one Lamb, who was also a clerk of the defendant, but was then in Alabama, kept the defendant's books ; that two books, which the plaintiff put into the hands of the witness, were the defendant's pass books, and contained an account

of the dealings between the plaintiff and defendant, both debt and credit ; that they were made up at the defendant's store in Boston, and that the defendant always had access to them ; that all the entries therein were in the handwriting of the witness or of said Lamb, except the credit to the defendant of the note in question ; and that the entries made by the witness were correct.

The defendant objected to the admission of these books in evidence, because said Lamb was not called to verify the entries made by him, and because it did not appear that the defendant had ever seen or approved of said entries. But as it appeared that notice had been duly given to the defendant to produce his books, and that he had refused so to do, and that said books were kept by his clerks, at his store and subject to his inspection, the judge overruled the objection and admitted the books in evidence. By these books it appeared that the defendant was indebted to the plaintiff, on the 28th of April 1837, in a sum exceeding \$306.

The plaintiff then produced a letter in the defendant's handwriting, directed to ' Mr. Alexander Coolidge, Natick,' in these words : " Boston, April 28, 1837. Mr. A. Coolidge. Dear Sir. I enclose you the note of Whitney's, indorsed as proposed, which you will please pass to my credit, and acknowledge the receipt of the same. You will please not let Whitney know you have it. Yours, N. H. Brigham." The plaintiff also produced a note corresponding to the one described in his declaration, and called D. M. Whitney, who testified that the indorsement of his name on said note was a forgery. He further testified that on the day before the trial of an action which the plaintiff brought against him as indorser of said note, viz. November 23d 1838, he called with the plaintiff at the defendant's store in Boston, and that the plaintiff then told the defendant he was going to have a trial with Whitney on that note, and wished the defendant to furnish any evidence which he had to prove the note genuine, for he (the plaintiff) could find none. The witness further testified that something was said, at that time, about a prior written notice from the plaintiff to the defendant.

The plaintiff also called G. Whitney, who testified that the indorsement of his name on said note was a forgery.

Evidence was also given by the plaintiff of a notarial record of the protest of said note for non-payment at maturity by the maker, and notices to the said supposed indorsers.

It appeared that the plaintiff, on the 12th of July 1838, commenced an action on said note, against D. M. Whitney as indorser, which was tried in this court on the 24th of November following, and that a verdict was returned for the defendant in that suit, and that the plaintiff paid to said defendant the costs of that suit, amounting to \$74.38; which sum the plaintiff claimed of the present defendant as part of the damages for breach of the warranty set forth in his declaration in this action. He also claimed of the defendant the notary's fees for the protest aforesaid.

There was much evidence, on both sides, as to the ability of G. C. Whitney, the maker of said note, to pay it at maturity, and as to his general credit and responsibility at and about that time.

The defendant contended that there was no evidence of any warranty; that all the evidence thereof was in the defendant's letter aforesaid, and that it did not appear that the note in question was in that letter. And the jury were instructed, that unless they were satisfied that the note produced by the plaintiff was the note sent by the defendant to him in that letter, their verdict should be for the defendant; that if it was the note thus sent in said letter, the letter was a warranty by the defendant of the genuineness of the signatures on the note; and that if the jury were satisfied that the names of the indorsers were forged, the plaintiff was entitled to a verdict, unless there were some other objections to his right to recover.

The defendant also contended that the plaintiff had lost the debt by his own negligence in not enforcing the collection of it, in a reasonable time, against G. C. Whitney, the maker of the note. And the jury were instructed to return a verdict for the defendant, if they were satisfied that the plaintiff had lost the debt by his own negligence.

The defendant objected, that if he were subject to any damages, yet that the costs of the plaintiff's suit aforesaid against D. M. Whitney ought not to be allowed as a part of the damages. Upon this point, the jury were instructed, that if that suit was commenced in good faith and without a knowledge of the forgery, and if the plaintiff gave the defendant seasonable notice of the pendency of the suit, and requested him to furnish evidence of the genuineness of the indorsements — giving to the defendant a reasonable time for that purpose — and the defendant neglected or omitted so to do, then the plaintiff might recover the costs of that suit as a part of the damages caused by a breach of the warranty.

The jury found a verdict for the plaintiff. It was made up as follows : For the note \$ 306 ; interest \$ 86 ; protest \$ 3 ; costs of the former suit \$ 74.38 ; whole amount \$ 469.38.

“ If the instructions, as to the plaintiff's right to recover the costs of his suit against D. M. Whitney, were erroneous, the verdict is to be amended by deducting therefrom \$ 74.38, and the plaintiff is to have judgment on the verdict thus amended, provided the jury were rightly instructed as to other matters ; but if any of the rulings or instructions on the other points were erroneous, the verdict is to be set aside and a new trial granted. And if there were no ruling or instructions incorrect, which were prejudicial to the case of the defendant, the judgment is to be rendered for the whole amount of the verdict.”

Brigham, for the defendant.

Buttrick, for the plaintiff.

WILDE, J. The principal question in this case was fully considered and decided at a former hearing. 1 Met. 547. It was then decided that the letter from the defendant to the plaintiff amounted to a warranty that the note enclosed was “ indorsed as proposed,” or in other words, that it was indorsed as it purported to be. On this point the instructions to the jury were in conformity to that decision, and were, we think, unquestionably correct.

The only questions now to be considered are, 1st. whether the ruling of the court was correct in admitting the evidence to

prove the state of the account current between the parties ; and 2d. whether the jury were rightly instructed as to the rule of damages. As to the first question, it is objected that the pass books, containing an account of the dealings between the parties, ought not to have been admitted in evidence, because some of the items were not verified by the clerk who made the entries. But as these entries were proved to have been made by the defendant's clerks, he having access to them, and that one of the clerks was out of the Commonwealth, and that the defendant refused to produce his books, we think the evidence was competent. These pass books are entitled to equal credit with the defendant's other books of accounts, and must be presumed to be true transcripts from those books, unless the contrary can be proved by the defendant.

As to the other question, we are of opinion that the instructions to the jury, as to the rule of damages, were correct. In pursuance of these instructions, the jury must have found that the suit against D. M. Whitney was commenced by the plaintiff in good faith, and without knowledge of the forgery, and that the plaintiff gave seasonable notice to the defendant of the pendency of that suit, requesting him to furnish evidence of the genuineness of the indorsements. Under these circumstances, we are not aware of any rule of law by which we are authorized to disallow the costs recovered against the plaintiff in that suit, as part of the plaintiff's actual damages. On the contrary, we think the rule established in actions of covenant for a breach of the covenant of warranty in the conveyance of real estate must govern the present case. In such cases, the covenantor is held responsible, after an eviction, for the costs of suit attending the eviction, because he is bound to protect the covenantee in defending the title warranted. *Swell v. Patrick*, 3 Fairf. 9. *Staats v. Ten Eyck*, 3 Caines, 115. *Bennet v. Jenkins*, 13 Johns. 50. And we perceive no distinction, in reason, between such a covenant of warranty and a warranty on a sale of personal property. Nor do the authorities support such a distinction. On the contrary, it was held, in *Lewis v. Peake*, 7 Taunt. 153, and 2 Marsh. 431, that where the buyer of a horse with

warranty resells him with warranty, and, being sued thereon, offers the defence to his vendor, who gives no direction as to the action, the buyer, after unsuccessfully defending that action, is entitled to recover the costs thereof from his vendor, as part of the damages occasioned by his breach of warranty. The same doctrine was also held in *Blasdale v. Babcock*, 1 Johns. 517.

Another objection was made, at the argument, to the assessment of damages, which however was not made at the trial, and respecting which no instructions were given. This objection, therefore, cannot be now considered. The objection is, that the value of the note in question ought to have been estimated by the jury, and the amount deducted from the amount due on the note. This undoubtedly would have been done, if the defendant's counsel had requested it. But the defendant will suffer no damage from the omission, as he is now entitled to the note; and if the plaintiff should refuse to deliver it to him, he will be liable to an action for the value.

Judgment on the verdict.

LEVI DOW vs. INHABITANTS OF THE FIRST PARISH IN SUDBURY.

Where a person withdraws from a parish, in the manner provided by the Rev. Stat. c. 20, § 4, after the parish has granted a sum of money to defray its expenses, and before the expiration of the parochial year for which the money is granted, and a tax to raise the sum granted is not assessed until after the expiration of such year, and after a new valuation of estates is taken, and is then assessed on that valuation, such person cannot be legally included in such assessment.

Where a parish tax is illegally assessed upon a party and is collected by distress and sale of his property, he may maintain an action for money had and received, against the parish, for the amount of the tax, but not for the costs of the distress.

ASSUMPSIT for money had and received. The action was brought to recover the amount of a tax assessed upon the plaintiff, and collected of him by the defendants, and also to recover the amount of the costs of collection paid by the plaintiff. The agreed facts of the case were these: Prior to the 11th of April

1840, the plaintiff was a member of the first parish in Sudbury, and on that day he filed with the clerk of the parish a written notice, declaring the dissolution of his membership.

On the 18th of March 1839, the parish voted to grant \$ 500 to defray parish expenses for the year then ensuing, and that sum was duly assessed in that year. On the 18th of September 1839, the parish voted to grant \$ 275 for the support of preaching till the next annual meeting. At the next annual meeting, March 30th 1840, assessors for the year then ensuing were duly chosen and qualified. On the 2d of May 1840, these assessors, finding that the aforesaid grant of \$ 275 had not been assessed, gave due notice to the inhabitants of the parish to bring in lists of the polls and estates on which said grant should be assessed ; but no list was brought in. In June 1840, said assessors made an assessment of said sum upon the inhabitants of the parish, including the plaintiff, and committed the tax list, with their warrant, to the parish collector, who duly seized and sold the plaintiff's property for payment of said tax and charges, and paid the same into the parish treasury.

E. R. Hoar, for the plaintiff.

J. Keyes, for the defendants.

DEWEY, J. By the provisions of Rev. Sts. c. 20, § 18, parish taxes "shall be assessed on the polls and estates of all the members of the parish, in the same manner and proportion as town taxes are by law assessed." If this rule were to be taken without reference to another provision, found in § 4 of the same chapter, respecting the effect of filing a certificate of withdrawal from a parish, it would seem quite clear that all parish taxes are to be assessed with reference to membership, property, &c., as they existed on the first day of May, in each year ; and that in making the list of persons liable to assessment, it should be restricted to those who were members of the parish at that period, in accordance with the corresponding provisions in relation to town taxes, as found in Rev. Sts. c. 7, §§ 6, 7, 9.

Great practical convenience results from adopting some definite period in each year for the valuation of estates and enumer-

ation of polls, in reference to the assessment of taxes ; and although an assessment made upon this basis may not always operate with perfect equality upon those who are not permanent inhabitants, yet the system, as a whole, does substantial justice ; and the rule being familiarly known, individuals may regulate their change of residence in reference to it.

In the assessment of town taxes, this simple and explicit rule of inhabitancy on the first day of May is the only test of liability to taxation for polls and personal estate ; and real estate is also taxed in reference to the ownership or occupancy on the same day. But in regard to parishes, in order to secure the most perfect freedom in the enjoyment of the rights of conscience, and in the selection of religious associations, every individual has the right to sever his connexion with a parish, at his pleasure. With this privilege, however, the member, thus severing his connexion, is subject to the liabilities provided in Rev. Sts. c. 20, § 4, wherein it is enacted that “ all persons, belonging to any religious society, shall be taken and held to be members, until they shall file, with the clerk of such society, a written notice declaring the dissolution of their membership, and thenceforth shall not be liable for any grant or contract which may be thereafter made or entered into by such society.” In the present case, the question turns upon the construction to be given to the latter clause of this section.

The plaintiff, before the making either of the valuation or the assessment of the tax, had dissolved his connexion with the first parish in Sudbury ; and if the right of taxation by the parish was limited to the period of actual membership, the tax upon the plaintiff was illegally assessed. But the defendants contend that the dissolution of membership, resulting from the filing of a certificate to that effect with the clerk of the parish, did not release the plaintiff from liability to taxation, where such taxation was founded upon a grant of money or contract which had been made before such certificate was filed ; and for this position they rely upon the statute already cited.

It is only by implication, that a liability is created by this section of the statute ; the argument being, that inasmuch as it is

provided that all liability, as to future grants and contracts, shall cease upon filing such certificate, it may be supposed thereby to affirm, indirectly at least, that as to grants and contracts already made, the liability still continues. Assuming such to be the proper inference to be drawn from the language of the statute, still it will be found extremely difficult to give to this provision the force and effect that are contended for, and not thereby extend this liability beyond what may reasonably be supposed to have been contemplated by the legislature. Are those, who are once members of a religious society, liable thereafter always to be taxed for the payment of the salary stipulated to be paid to a clergyman who may happen to have been settled over the parish while they were members? A stipulation that such salary shall be paid for a term of years, or during the ministry of the pastor, would be a valid contract, as between him and the parish; and as it respects all who were members at the time of making such contract, it would be a contract entered into by the parish before their withdrawal from the parish.

An attempt was made to enforce a similar principle, in the case of *Whittemore v. Smith*, 17 Mass. 347, where a territorial parish had borrowed money to build a meeting house; it being during the period while the plaintiff in that action was an inhabitant of the parish and liable to taxation. Subsequently, and after the plaintiff had removed from the parish, the parish voted to raise money to discharge this debt, and assessed the same. The court held that the plaintiff was not liable to assessment, under the vote to raise this money, after his removal from the bounds of the parish. It was however suggested in the opinion of the court, that if the money had been granted before the filing of the certificate, the case might have been different. But that case occurred before the statute provision now relied upon existed.

The case of *Inglee v. Bosworth*, 5 Pick. 501, presented the question of the construction of *St.* 1823, c. 106, § 2, which was in these words: "Any person may separate from one religious society and join another, by filing with the clerk of the society left a certificate of the fact under the hand of the clerk

of the society which such person elects to join ; but such person shall remain liable to pay all such taxes as may have been actually granted or assessed against him previous to such separation." Upon this statute, which is more direct and explicit in its terms, the court held that money voted to be raised to defray the parish expenses, though granted before the filing of the certificate, it not being actually appropriated or assessed until after it was filed, was not properly assessed upon the withdrawing members.

The general principle, that a withdrawing member of a parish remains liable upon a grant or contract already made by such society, must, we think, be taken and understood with some limitations ; and one of these limitations seems to be, that the liability of such persons to taxation, by reason of such previous grant or contract, is restricted to assessments made during the parochial year in which the money is granted, and within which it is, according to the usual practice, assessed. We think the rule applicable to this subject to be, that if a parish omit to assess a tax during the entire parochial year in which the money was granted, and until after a new valuation has been taken as the basis for taxation for the year subsequent, and then assess the same upon such new valuation, they cannot properly include in such assessment of taxes an individual who had ceased to be a member of the parish before the commencement of the parochial year in which said valuation and assessment are made.

The plaintiff being thus illegally assessed, he may maintain his action to recover back the amount of the tax collected of him and received by the defendants. *Inglee v. Bosworth*, 5 Pick. 501. *Baker v. Allen*, 21 Pick. 383. *Boston & Sandwich Glass Co. v. City of Boston*, 4 Met. 181.

In this form of action, the amount to be recovered must be limited to the amount of the tax paid, and the plaintiff will not be entitled to recover any costs he may have paid upon the levy of the warrant of distress.

Milton & another v. Colby & another.

**WILLIAM H. MILTON & another vs. RICHARD G. COLBY
& another.**

Where A., the owner of land, agrees to sell it to B., and to convey it to him by deed when B. shall erect a house thereon, and B. agrees to erect a house thereon, and that he will, on receiving a deed of the land, mortgage it to A. to secure the purchase money, B. does not, by erecting the house, acquire any property therein, but the same becomes a part of the realty; and a mortgage of the house by B., before he receives a deed of the land, conveys nothing to the mortgagee.

ASSUMPSIT to recover \$307.75 had and received by the defendants to the plaintiffs' use, with interest from January 21st 1841. The action was commenced October 4th 1841, and was tried at the last April term, before *Wilde*, J. who thus reported the case: It was proved that on the 13th of May 1839, a written agreement, (signed by the parties thereto, but not sealed, acknowledged or recorded,) was made between John Nesmith of the one part, and Andrew J. Simpson and John Diggles of the other part, witnessing that said Nesmith had sold to said Simpson and Diggles a lot of land in Belvidere (Lowell) numbered 125 on a certain plan recorded in Middlesex registry of deeds, for which they agreed to pay \$600 in five annual payments, with interest annually, and to erect a house on the same immediately; and that when the house should be erected, said Nesmith would convey the land by deed, and take back a mortgage to secure payment of the purchase money, with notes in the usual form. Simpson and Diggles jointly erected a house on the land, and completed the same in July or August 1839, and on the 12th of November following made a division of the house and land, by an agreement sealed, but not acknowledged nor recorded till July 27th 1841. By this agreement, the easterly half of the house was apportioned to Diggles, and the westerly half to Simpson; and they, after said agreement was made, occupied in severalty, according to said division, till January 21st 1841, on which day Diggles mortgaged his half of the house, as personal property, to the plaintiffs, to secure payment of a note, given by him on the same day, for \$307.75, *payable on demand*, with interest. The condition of this mortgage deed

was, that it should be void if Diggles should pay said note *in one year* from its date. This deed was recorded by the clerk of the city of Lowell on the day after it was executed.

On the 12th of June 1841, Diggles, by a writing on the back of said mortgage deed, agreed and consented that the mortgagees (the plaintiffs) might sell the mortgaged property, at private sale or public auction, as they should deem most advantageous, and apply the proceeds of the sale to the payment of said note. On the 15th of June 1841, Diggles made application to a master in chancery for a discharge under the insolvent law of 1838, and a warrant issued, and notice of the issuing thereof was published on the same day. On the 21st of the same June, formal possession was taken of said house by the plaintiffs.

On the 10th of July 1841, the defendants were chosen as assignees of the estate of Diggles, and on the 21st of said July they sold to Foster Nowal the said house for \$475, (which was the full value thereof,) and conveyed the same to him, by deed of quitclaim, together with the land which is described in the agreement of partition between Simpson and Diggles, with covenants of warranty against all persons claiming under the defendants or their successors, or said Diggles or his heirs, or any other persons claiming under them or either of them. And the defendants, on the same day, as assignees of said Diggles, quitclaimed to said Nowal all the right of said Diggles in the abovementioned original agreement between John Nesmith and said Simpson and Diggles, and guarantied to defend and save harmless the said Nesmith from all persons claiming under said Diggles.

On the 23d of July 1841, the said Nesmith (never having made a conveyance to Diggles) conveyed to said Nowal the lot of land described in the aforesaid agreement of partition, and on which said Diggles's house was erected, by a deed of quitclaim, for the sum of \$300; and on the same day said Nesmith conveyed to said Andrew J. Simpson the other (westerly) half of said lot by a like deed of quitclaim.

On the 4th of October 1841, the plaintiffs demanded of the defendants the amount of their aforesaid note, given to them by

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Diggles, to be paid to them from the proceeds of the sale made by them of said house, as aforesaid ; which the defendants refused to do.

On the 27th of September 1841, the defendants, in order to expedite the progress of this action, which the plaintiffs were then about to commence, agreed to waive all objection to the action on the ground that the condition of Diggles's said mortgage had not been broken.

After all the evidence was adduced, the case was taken from the jury and submitted to the whole court on the foregoing report.

Farley & A. R. Brown, for the plaintiffs.

Mellen & B. F. Butler, for the defendants.

SHAW, C. J. The court are of opinion, that the plaintiffs took no interest, by the mortgage made to them by Diggles of the house in question, and therefore that they cannot recover in this action, even if in other respects they could maintain an action against the defendants, as assignees ; which is very doubtful. We say it is doubtful, because the defendants, as assignees of Diggles, acknowledged no right of the plaintiffs to the property, but on the contrary claimed the whole adversely, for the creditors. If therefore the plaintiffs had any title under their mortgage, subject to which the defendants took their assignment, the plaintiffs' remedy must be on the property, and not on the money for which the defendants sold their title. But the ground, upon which the court decide the case, goes not merely to the remedy, but to the right of the plaintiffs, and is, that by the mortgage they took no title, because Diggles had none which could pass by that deed. His right to the house was founded wholly on the agreement of May 13th 1839, between John Nesmith, owner of the land, on the one side, and Simpson and himself on the other. It was the common case of an agreement for a sale of the land, upon certain terms and conditions. Simpson and Diggles agreed to erect a house on it, and when the house should be erected, Nesmith was to convey the land by deed to them, upon which they were to mortgage the estate back to Nesmith, to secure the purchase money. The house was erected, but no deed was made by Nesmith ; and so it stood,

when Diggle mortgaged the house to the plaintiffs, as personal property.

It appears to us, that the effect of this agreement was not that the builders of the house were to have a property in the house, as a chattel ; on the contrary, it was to constitute a part of the realty, and pass with it ; and when the agreement should be executed according to its terms, it would enhance the value of the estate, as a security to Nesmith for the purchase money. The general rule is, that the erection of a building on the land of another makes it part of the realty, and of course it becomes the property of the owner of the soil ; and it is only in virtue of an express agreement between the owner and builder, that one can have a separate property in a building, as a chattel, with a right to remove it. The agreement between these parties, so far from being such an agreement, was in legal effect an agreement that the building and soil should be united and held together as one tenement ; and the security of the builders was in the personal agreement of the owner, by which they could require him, on complying with the terms of the agreement on their part, to convey the fee to them, by which they would obtain a legal title to the buildings with the soil. No interest then passed by Diggle's deed to the plaintiffs ; none in the building, for it was part of the realty ; and none in the real estate, because the fee was in Nesmith.

Plaintiffs nonsuit

WILLIAM HEARD *vs.* PROPRIETORS OF THE MIDDLESEX
CANAL.

Under the St. of 1793, c. 21, incorporating the Proprietors of the Middlesex Canal, which provided that any person who should be damaged by said Proprietors, by their flowing his land, should have compensation therefor by application to a court within one year from the time of the damage done, it was *held* that the damage was done to the land owner, when said Proprietors' permanent dam across Concord River was completed, for the purpose of raising a head of water for the supply of their canal, and that he had no remedy by application to a court after a year from that time had elapsed.

THIS was a petition, presented to the court of common-pleas at the June term 1840, in which the petitioner set forth, that

before and ever since the 1st of May 1834, he had been seized and possessed of four tracts of meadow land in the town of Wayland, and that the Proprietors of the Middlesex Canal, a corporation established by law, had, in the prosecution of their business, ever since said 1st of May, and long before, maintained, kept up and continued a dam in the town of Billerica, across Concord River, and had, by means thereof, flowed said meadow land, whereby the same had been greatly damnified : That the petitioner, on the 1st of May 1840, requested of said proprietors, in writing, that they would make him such satisfaction for so flowing his said land, as he was entitled to receive by the provisions of the *St.* of 1793, c. 21, incorporating said proprietors, and that he demanded, as a reasonable satisfaction for the damage so sustained, the sum of \$2000 ; that the twenty days had elapsed, within which, by said act incorporating said proprietors, they should have made or tendered satisfaction for said damages ; yet that they had not made or tendered to the petitioner any reasonable satisfaction therefor : Wherefore he prayed the court to appoint a committee to estimate the damage so done to his land by said proprietors, as provided for in their said act of incorporation.

To this petition, the respondents filed a plea of not guilty, and a specification of the following matters, (among others,) intended to be given in evidence by them ; viz. that they had a right, during the time mentioned in said petition, to maintain and keep up the dam therein mentioned, in the manner and to the height in and to which they did maintain and keep up the same ; that they had so maintained and kept it up for more than 20 years next before the filing of said petition ; and that they had done nothing tending to obstruct the water of said Concord River, or to cause the same to set back on the petitioner's said land, at any time within one year next before the commencement of this suit.

At the June term, 1842, of the court of common pleas, the foregoing petition and the said plea and specification came on to be heard before *Strong, J.* and the respondents thereupon moved the court that said petition be dismissed with costs ;

whereupon the petitioner offered to prove the several allegations and statements in his petition, and especially that his said meadow land had been, during all the time stated in said petition, flowed and greatly injured by the waters of said river, and that said flowing and injury were caused by the said dam of the respondents. But the judge declined hearing the evidence, and did, without hearing it, order that said petition be dismissed with costs; and the petitioner alleged exceptions to said order.

B. Rand & Dexter, for the petitioner.

S. Hoar & B. R. Curtis, for the respondents.

SHAW, C. J. The right of the petitioner to damages must depend upon the construction of the act incorporating the Proprietors of the Middlesex Canal, and the several acts in addition thereto.

It is an established and highly salutary rule of law, that where the legislature authorize the erection of public works, which may involve the necessity of appropriating private property to public use, and provide a special remedy for the assessment and payment of damage for the property so appropriated, and such remedy is a constitutional one, the party, whose property is thus applied, can have no other remedy for his indemnity. This rule has already been applied to claims for damage, under this same act of incorporation. *Stevens v. Proprietors of Middlesex Canal*, 12 Mass. 466.

By the terms of the act, the remedy was to be obtained by petition to the court of sessions. That court was long since discontinued, and its jurisdiction transferred. It has not been denied, in the present case, that this jurisdiction has been transmitted, through various intermediate statutes, to the court of common pleas, and is now vested in that court. We have not examined these statutes with this view, but proceed on the assumption that the court of common pleas has this jurisdiction, and that the petition was rightly brought there.

The respondents, in their specification of defence, allege and offer to prove that the dam in question, of which the petitioner complains, was not erected, and has not been raised in height, within 20 years. This fact does not appear in proof, no ev

dence of the facts having been taken in the court below. But the motion to dismiss the petition, for want of any sufficient averment to support it, was this ; that it is not alleged in the petition, that the dam has been erected, or its height increased, within one year next before the complaint made and the petition filed ; but on the contrary it does aver, that the respondents have kept and maintained their dam for six years next before demand of damage made, and for a long time previously thereto, and does not allege that the dam has ever been raised since it was first erected. The precise question, therefore, for the consideration of the court, and which has been argued by counsel, is, whether the person, whose lands are alleged to have been damaged by flowing, can have this remedy, at any time after the dam has been erected and completed, and the lapse of one year from that time ; or whether he is barred, by the limitation of one year from the time the dam was erected. Upon this question, the court are of opinion, that the application for damages, and the legal proceedings consequent thereon, must be commenced within one year from the time of the damage done, and that, within the meaning and true construction of this act, the damage is done to the proprietor of adjacent meadows, whose land will be flowed, when the permanent dam is erected, the natural and necessary effect and operation, as well as the obvious and avowed purpose of which are, to raise a head of water, for the permanent supply of a canal. This conclusion, we think, results as well from the terms, as from the manifest objects and policy of the act.

The Middlesex Canal was a public work. And although the benefit to the public was the ultimate object, it was to be obtained, like many other public benefits, such as bridges and turnpikes, through the agency of a joint stock company, who would advance the funds for the enterprise, and be indemnified by a toll fixed by law, subject, after a certain time, to be regulated by the government. That it was regarded by the legislature as a public work of great utility, is manifest from the original act of incorporation, and the various subsequent acts in addition thereto.

It was also a permanent work. It was not limited to any term of years, but, like a highway, it was perpetual; and the uses of a canal would require that the water be kept up during the whole year.

What then is the nature of the damage, which an owner of land may sustain from the erection and maintenance of such a dam? It is a work authorized by law, and by a law which recognizes the right of the legislature to take private property for public use, on paying an adequate compensation therefor, and provides for its exercise; so that it is not unlawful, its erection is not a nuisance, and its maintenance is not the continuance of a nuisance. It is permanent and perpetual in its nature. It is done for the purpose of raising and maintaining water to a certain height, and the damage, which that may do to adjacent land, will be permanent. It not only deprives the owner of the products and profits of the land, but by permanently changing its condition, it deprives it of the capacity for future cultivation and improvement. It therefore deprives the land, in whole or in part, of its actual, present exchangeable value; and such loss or diminution of value is the measure of the owner's damage. It may be that the land has never yielded any profit; it may be swamp or morass; but if capable of being drained, subdued and cultivated, it is of value; and depriving it of that capacity for improvement is a loss to the owner. And these considerations are all to be taken, by those who are called on to assess such damages.

These views, we think, are distinctly and fully recognized in the provision made for the assessment of damages, in the act of incorporation. *St.* 1793, c. 21. (1 *Special Laws*, 467.) It recites that "whereas it may be necessary, in the prosecution of the foregoing business, that the property of private persons may, as in the case of highways, be appropriated for the public use; in order that no person may be damaged by the digging and cutting of canals through his land, by removing mills or mill dams, diverting watercourses, or *flooding his land*, by the proprietors aforesaid, without receiving full and adequate compensation therefor: Be it enacted, that in all cases where any

person shall be damaged in his property by the said proprietors, for the purposes aforesaid, in manner as is above expressed, or in any other way, and the proprietors aforesaid do not, within 20 days after being requested thereto, make or tender reasonable satisfaction to the acceptance of the person damaged by them as aforesaid, the person so damaged may apply to the court of general sessions of the peace, to have a committee appointed by said court, to estimate the damage so done ; and the said court are hereby authorized and empowered by warrant under the seal thereof, upon such application made, if within one year from the time of the damage done as aforesaid, to appoint a committee of five disinterested freeholders to estimate the damages." It goes on to provide a mode for the estimation and payment of the damages. It is manifest that the legislature consider, not that the land is temporarily affected, or its profits taken away or diminished, but that the property is "*appropriated* for the public use," and so far permanently taken from the owner. It is a perpetual burden and incumbrance. It is likened to land taken for a highway. But when land is taken for a highway, the owner is not divested of the fee, but the public acquire a perpetual easement, which practically operates to take away the whole value of his estate ; and damages are ordinarily estimated accordingly. This very analogy indicates the understanding of the legislature that this flowing of land would cause a perpetual incumbrance, like that of laying a highway over it, and leads to the inference, that they intended it should be compensated for, in the same manner. Further ; this appropriation of the land, by flowing it, is put on the same footing with digging a canal through it, removing mills or mill dams, or diverting watercourses, all of which constitute an immediate diminution of the value of the estate. There is nothing in the act, indicating an intention of the legislature that there was to be more than one assessment of damages ; and if this should not include the entire loss which the owner might sustain, by the diminution of the value of the estate, it would fall short of that "adequate compensation" for which they intended to provide.

But we think the same conclusion follows from considering

the nature of such an enterprise, and the policy and purposes of the act establishing it. Whether a public improvement will be beneficial, depends upon a comparison of the utility with the cost. Compensation for land taken constitutes an essential part of the cost ; and if it is to pass over highly improved and very valuable lands, as through a city or thickly settled village, it is a good reason why the enterprise should not be undertaken ; but if over lands of little value, it would be otherwise. Now land may be of little value, when the work is determined on and laid out, and if the entire cost is then assessed, it may be a small sum. But if the damage is to be assessed, from time to time, in all future time, after lands have risen in value, from the progress of improvement, the cost of such a work could never be known nor estimated. Such a continuing and growing liability, especially when, as in the present case, the liability for damages is made a charge upon every stockholder in the company, would operate as a discouragement, if not an absolute bar to every such undertaking. But if the entire damage for land can be not only estimated and ascertained, but paid, whilst the work is in progress, whilst the original proprietors and managers have the superintendence and conduct of its affairs, the costs of land will be included and liquidated, with the other costs of the work, and the whole made up and included in the capital stock of the company.

The court are therefore of opinion, that the damage, contemplated by the act, is not the remote and consequential damage, which may arise from the future operation of the work, but the immediate and direct damage arising from the erection of such a work. It is erected for public use, sanctioned by law, permanent in its operation on the complainant's property, and perpetual in its duration ; it either passes over the complainant's land, or it is so situated as to affect it and impair its value. The damage done, then, is the immediate damage done to the complainant's estate by changing its permanent condition and impairing its present value, and this is done by the erection of the dam ; and of course the term of one year, within which the complaint must be made, is to be computed from that time.

On any other supposition, this would be practically no limitation. If one year should be computed from the time of the complainant's receiving damage, by the loss of his grass, this is a danger perpetually recurring, and complaints would be brought from year to year, in all future time. But the construction adopted by the court does, in our opinion, secure the just claims of the land holders, affords protection to the promoters of a useful public enterprise, and is consistent alike with the provisions and the policy of the act of incorporation.

Exceptions overruled and petition dismissed.

JOHN H. BROWNING & others vs. JEFFERSON BANCROFT.

A sheriff is not so "interested" in an action of replevin brought against his deputy for property attached by him, as to authorize a coroner, under the Rev. Sts. c. 14, § 97, to serve the writ of replevin on the deputy.

By St. 1840, c. 87, the judgment of the court of common pleas upon a plea in abatement is not the subject of appeal, writ of error, or bill of exceptions, but is final in that court.

REPLEVIN. The defendant pleaded in abatement of the writ, that the same was not legally served, inasmuch as it was directed to the sheriff of the county, or his deputies, and was served by Joseph Butterfield, a deputy of said sheriff; whereas it should have been directed to and served by a coroner; because the damages demanded in said writ exceed \$70, (so that it could not be served by a constable,) and because, at the time of the taking, by the defendant, of the goods mentioned in said writ, he was a deputy of said sheriff, and, as such deputy, and by virtue of certain writs of attachment, and in no other manner or capacity, he took and detained said goods; whereby the said sheriff was interested in this case, &c. Demurrer and joinder.

Hopkinson, in support of the demurrer.

B. F. Butler, for the defendant.

SHAW, C. J. The Rev. Sts. c. 14, § 97, have altered the law in respect to the power and duty of coroners to serve writs. By St. 1783, c. 43, § 1, they were to serve all writs where the sheriff or either of his deputies was a party. By the

revised statutes, they are to "serve and execute all writs and precepts, and perform all other duties of the sheriff, when the sheriff shall be a party or interested in the case." A remote or contingent interest of the sheriff, which may arise and grow out of the suit afterwards, is not such an interest as authorizes a coroner to serve the writ. It must be, that the judgment in the suit will bind or conclude some valuable right or pecuniary interest of the sheriff. The sheriff has no such interest in an action of replevin by a third person against one of his deputies. The defendant has only to do his duty—and the presumption is, that he will do it—and he will incur no responsibility, either to the plaintiff in replevin or the attaching creditor, for which the sheriff will stand responsible. It is clear that the legislature could not have understood that the mere fact of his deputy being a party would render the sheriff interested; because, in that case, they would, obviously, have retained the old provision, and given the authority to a coroner in all cases where the sheriff or his deputy is a party. *Commonwealth v. Moore*, 19 Pick. 339. *Kutridge v. Bancroft*, 1 Met. 514. There must, therefore, be some other interest set out in the plea, in order to abate the writ because it was served by a deputy of the sheriff. In this case, no such interest is shown, and the demurrer to the plea, in our opinion, is good.

On the argument, it did not appear how this case came before the court, and the *St.* of 1840, c. 67, was not adverted to. It now appears that it came by appeal from the judgment of the court of common pleas. But it is very clear that by that statute, §§ 4 and 5, the judgment of the court of common pleas, on a plea in abatement, is final, and cannot be brought before this court, either by appeal, error, or bill of exceptions.

Appeal dismissed; the court having no jurisdiction.

GILES PEASE *vs.* JEFFERSON BANCROFT.

Where an equity of redemption is attached by different creditors, at different times, a sale thereof on execution by the second attaching creditor, before the first has recovered judgment, is void as against all the others, and the third attaching creditor thereby obtains the rights to which the second would otherwise have been entitled. And such was the law, even before the provisions of the Rev. Stat. c. 97, §§ 34, 35.

Three creditors, on different days, attached their debtor's right of redeeming mortgaged real estate; A., the second attaching creditor, first recovered judgment, and sold the equity of redemption to B., on his execution: The debtor afterwards released his interest in the mortgaged estate to B: B. released the same to A., who released it to P: The first attaching creditor subsequently recovered judgment, and caused the equity to be sold on execution, and the proceeds of the sale exceeded the amount of his judgment and the officer's fees: The third attaching creditor afterwards recovered judgment, and put his execution into the hands of the officer who held the surplus proceeds of said sale, and he applied those proceeds towards satisfaction of that execution. P. claimed those proceeds, and brought an action against the officer for misapplying them. *Held*, that the proceeds were rightfully applied by the officer, and that P. had no cause of action against him.

THIS was an action to recover \$ 100, which came into the hands of the defendant, as deputy sheriff, and was claimed by the plaintiff. The case was submitted to the court on the following facts:

On the 1st of August 1833, Darius Young was owner of an equity of redemption in certain real estate in Lowell. This equity was attached on three writs sued out against said Young by three of his creditors, namely, Daniel Dole, Jonathan Morse 2d, and William W. Fuller. Dole's attachment was made on the 2d of said August, on a writ in which the damages were laid at \$ 200. Morse's attachment was made on the 27th, and Fuller's on the 30th of said August. These writs were duly returned and the actions were entered in court and prosecuted, respectively, to final judgment.

In said Morse's action, judgment was recovered and execution issued in June 1834. The execution was delivered to the officer who served the original writ, within thirty days after judgment was rendered, and he advertised and sold said equity of redemption, on said execution, on the 13th of August 1834, at public auction, to Artemas Young, for \$ 30, and made due return of his doings to the clerk's office, within ninety days.

The execution and the officer's return thereon were duly recorded in the clerk's office and in the registry of deeds, within ninety days after said sale. On the 10th of March 1835, Darius Young released his interest in the premises to Artemas Young, by a deed of quitclaim. On the 12th of said March, Artemas Young, by a deed of quitclaim, released the same to said Jonathan Morse 2d, who gave a deed of quitclaim thereof to the plaintiff, on the 25th of August 1835.

Daniel Dole recovered judgment in his suit against Darius Young, in January 1837, and within thirty days thereafter, the execution which issued thereon was put into the hands of the defendant, who attached the equity on the original writ; and he, after due advertisement, sold the same, on said execution, according to law, on the 1st of April 1837, to William W. Fuller aforesaid, for \$ 300. At the time of this sale, notice was given to the defendant of the pendency of said Fuller's suit against said Darius Young, and of the attachment of said equity on the original writ in that suit.

Said Fuller recovered judgment in his suit against said Young, at the June term, 1837, of the court of common pleas, and within thirty days thereafter took out execution thereon, and put it into the hands of the defendant, who thereupon paid to said Fuller, in part satisfaction of his execution, \$ 100, the sum which remained in the defendant's hands after satisfying the execution of Daniel Dole against said Darius Young — being the surplus proceeds of the sale of said equity on the last mentioned execution — and made return on said Fuller's execution that it was satisfied in part, namely, for the sum of \$ 100.

At the time of the sale on Dole's execution against Young, the defendant had knowledge of the prior sale on Morse's execution against Young, and the present plaintiff demanded of the defendant the said \$ 100, before he paid it, as aforesaid, to said Fuller.

Mellen, for the plaintiff. By the Rev. Sts. c. 97, §§ 34, 35, provision is made by which a subsequent attaching creditor may preserve his lien, though he recover judgment before the prior attaching creditor; and under those statutes, the plaintiff might

not have a cause of action against the defendant. But this case depends on the law as it stood in 1834, before those statutes were passed; and the question is, whether the officer had power to sell the equity of redemption, on the execution that issued in the second action in which it was attached, while the first action was pending.

The ground taken by the plaintiff is this; that the sale was valid as against every body except the first attaching creditor. By *St. 1798, c. 77, § 5*, the officer's deed of the equity was as effectual to all intents and purposes, as if it had been made by the judgment debtor; like *St. 1783, c. 57, § 2*, by which an extent made as good a title to the creditor as the debtor himself had. *Bartlet v. Harlow*, 12 Mass. 350. An extent is good, if contingent liens are not deducted. *Barnard v. Fisher*, 7 Mass. 71. *Warren v. Childs*, 11 Mass. 222. *White v. Bond*, 16 Mass. 400. See also *Clark v. Austin*, 2 Pick. 528. *Bigelow v. Willson*, 1 Pick. 491, 492.

Dole, the first attaching creditor, could hold only to the amount of \$200, the *ad damnum* in his writ. *Chickering v. Lovejoy*, 13 Mass. 56.

E. Fuller, for the defendant.

SHAW, C. J. None of the cases cited, we think, are directly in point; but the case depends on a few plain principles. The plaintiff claims of the defendant \$100, as the surplus of the sale by him, as a deputy sheriff, of an equity of redemption, over and above the amount of the execution upon which it was sold. As this equity was sold in June 1834, and the plaintiff took his title by a quitclaim of the estate to him by Jona. Morse 2d, in August 1835, it is very questionable whether he could maintain an action for this surplus, in his own name, even if it properly belonged to Darius Young, the original debtor, or Artemas Young, the purchaser of the equity of redemption, under the same attachment, as hereafter stated. The doubt is, whether a mere quitclaim deed of the estate would operate as an assignment of this surplus, in the hands of an officer, who had sold the equity of redemption on execution; and if it would, then, whether it would be any thing more than an assignment of a chose in action.

But we are all of opinion, that the second attaching creditor had no right to cause the equity of redemption to be sold on his execution, whilst the prior attachment was pending ; and that the purchaser from the officer, at that sale, took nothing by that deed, as against the prior attaching creditor ; and that when the sale was rightfully made on the execution issued in pursuance of the first attachment, the former was rendered wholly void. An equity of redemption is necessarily single and indivisible, and there can be but one rightful and valid sale, and but one party can have a right to redeem. In this respect it is entirely distinguishable from *Barnard v. Fisher*, 7 Mass. 71, and the other cases of levy on execution, where the property is taken at an appraisement, and where an equity of redemption is levied on, without deducting any thing for the incumbrance. A sale is made at what a purchaser will give, and this is necessarily influenced by the existence of prior attachments. This was manifest in the present case, where an equity was sold for \$ 30, which afterwards sold for \$ 300.

Whether this sale on the second attachment, pending the first, would have been good against the debtor, if the first attaching creditor had never obtained judgment, or never caused the equity to be sold pursuant to his attachment, we give no opinion. If it would have been good, it would seem to be injurious to the debtor, by causing his property to be sold at a reduced value. But the question does not arise here, because the plaintiff in this case represents both the original debtor and the purchaser under such second attachment.

The second attaching creditor having thus taken his judgment before the first, and attempted to sell the equity, and nominally satisfied his execution, the third attaching creditor became second, and having waited till after the valid sale, and then taken his judgment and execution, and seasonably demanded this surplus, we are of opinion that the defendant rightfully paid it over to him. The plaintiff could not demand the surplus, in virtue of his conveyance derived from Darius Young, the debtor, because the third attachment was made before his conveyance, and was good against the debtor ; nor in virtue of the conveyance of

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Artemas Young, because he had no title, but as purchaser at the void sale of the equity, on the execution of the second attaching creditor.

Judgment for the defendant.

BENJAMIN F. BUTLER vs. DANIEL R. KIMBALL.

An action may be maintained upon a note, against the maker, where the writ is made after sunset on the last day of grace, and is delivered to an officer on the next day, although there is no demand of payment before the writ is made.

ASSUMPSIT by the payee of a promissory note against the maker. The note bore date July 20th 1840, and was made payable to the plaintiff, or his order, in four months after date.

It was agreed by the parties, that the writ was made on the 23d of November 1840, after sunset, and was put into an officer's hands the next day, when it was served. No demand was made on the maker, before the writ was drawn.

On these facts, it was submitted to the court whether the action could be maintained.

Butler, pro se. The action, even if it is regarded as *commenced* when the writ was made, was not prematurely brought. *Whitwell v. Brigham*, 19 Pick. 117. *Swift v. Crocker*, 21 Pick. 241. The defendant could not have tendered payment after sunset of the last day of grace. *Bac. Ab. Rent. I. Tender, D. Savary v. Goe*, 3 Wash. C. C. 140. The plaintiff might therefore well commence this action, as soon as the time, within which a tender could be made, had expired. A plea of tender on the last day would be bad; it should be alleged to have been made on the last convenient hour of the day. But in case of negotiable notes, the maker is not entitled to the whole of the last day to tender payment. *Shed v. Brett*, 1 Pick. 401. *Church v. Clark*, 21 Pick. 310. *City Bank v. Cutter*, 3 Pick. 418.

The action may be regarded as *commenced* when the writ was given to the officer. *Seaver v. Lincoln*, 21 Pick. 267. *Bad-*

ger v. Phinney, 15 Mass. 359. *Robinson v. Burlingame*, 5 N. Hamp. 225. *Johnson v. Furwell*, 7 Greenl. 373.

J. G. Abbott, for the defendant. The maker of a note is entitled to the whole of the last day to make payment, unless demand of payment is made at a reasonable hour of that day; and the note "is not suable until the day of maturity be passed, unless demanded on that day." *Greeley v. Thurston*, 4 Greenl. 483. *Lunt v. Adams*, 5 Shepley, 230.

The facts of this case do not show that the writ was made *provisionally*, as in the cases cited from 15 Mass. and 21 Pick.; and the action must therefore be considered as commenced when the writ was filled up. *Gardner v. Webber*, 17 Pick. 407.

THE COURT ordered judgment to be entered for the plaintiff.

JOHN A. MERRIAM vs. JONATHAN BACON.

A. and B. mortgaged their land to C. to secure a note made by A. payable to C. or his order: C. assigned the mortgage and note to D. but did not indorse the note; and A. had notice of the assignment: D. brought an action on the note, in the name of C., against A., and B. afterwards paid the amount of the note to C. and took his receipt. *Held*, that this payment, though made by B. in good faith, and without actual notice of the assignment, could not avail A. as a defence, whether it was made at his request or without his request; and that D. was entitled to judgment, in C.'s name, on the note.

ASSUMPSIT by the payee against the maker of a negotiable note dated January 24th 1837. Defence, payment.

At the trial, the defendant offered in evidence a copy of a mortgage deed, bearing the same date with that of the note, made by himself and Frederic Bacon to the plaintiff, conveying to him a tract of land, upon condition that if the defendant or said Frederic should pay to the plaintiff or his heirs, &c., \$600 in one year, with interest, then said deed and note should be void; also a receipt dated June 23d 1840, signed by the plaintiff, acknowledging that he had received the amount of the note from said Frederic. The plaintiff objected to the admission of this evidence, and offered to show that, before he gave the said receipt, he had assigned all his interest in the note, by mesne

conveyances, to Robert W. Edwards, and that the defendant had notice of said assignment, and knew that the note was held, and that this suit was prosecuted by said Edwards, when the receipt was made. This objection was overruled, and the aforesaid papers, offered in evidence by the defendant, were read to the jury.

The plaintiff then offered in evidence, an assignment of said mortgage and note, made by him to Robert Edwards, March 18th 1839; an assignment by said Edwards to Rufus Litchfield, April 10th 1839; and an assignment by said Litchfield to Robert W. Edwards, dated January 1840; all which assignments were duly executed and acknowledged, and were recorded April 28th 1840. The note, however, was assigned without being indorsed by the plaintiff.

W. Sawyer, a witness called by the plaintiff, testified that the note was left with him for collection by Robert W. Edwards; that he wrote a letter to the defendant "on the subject of the note," and received a letter from him in reply; that the defendant called on him, a few days afterwards, and said he was not then prepared to pay the note, but would pay it soon,—mentioning a time after the last day of service for the next term of the court of common pleas: That the witness informed the defendant that he could not wait for payment till the time mentioned, as he was instructed to put the note in suit if it was not paid before the last day of service; whereupon the defendant said, "if Edwards keeps quiet, he will get his money; but if he sues it, I will keep him out of it as long as I can. I have as much money to spend as Edwards has."

It was admitted that Frederic Bacon was son of the defendant, and resided in Boston, and that the defendant resided in Bedford.

The presiding judge proposed to instruct the jury that upon these facts, the plaintiff ought to recover. Thereupon the case was taken from the jury, under an agreement that the court might decide it upon the foregoing facts, making all inferences which a jury might legally make from the evidence.

Hopkinson, for the plaintiff.

Wentworth, for the defendant.

SHAW, C. J. The note had been assigned by the payee, with notice to the promisor, the present defendant, long before the alleged payment by Frederic Bacon, now relied upon ; a payment therefore by the promisor himself, to the original payee, would have been a payment in his own wrong : The question is, whether he can avail himself of a payment, made by Frederic Bacon, his son, not a party to the note, but a co-mortgagor, in a mortgage given to secure it. This question is to be considered on the ground that the payment was actually made by Frederic Bacon to the original payee, in good faith, and without actual notice of the assignment. If such payment was made at the actual request of his father, then he acted in behalf of the father, and as his agent, and must be affected with notice of any thing which would affect the father ; or, to state the proposition a little differently, the present defendant cannot avail himself of a payment made at his actual request by another person, which he could not have availed himself of, had he made the payment personally.

But the only plausible ground on which to distinguish a payment made by the son, from one made by the father, is, that Frederic was independently liable for the debt, by having pledged his estate for the payment ; and therefore payment of the debt of the principal, under a legal liability, was a request in law, as in case of payment by a surety or co-obligor, which rendered it a payment for the principal. Let us examine this ground. Not being a co-promisor, or personal surety, his only liability was that of a mortgagor. He was a mortgagor after condition broken, and his only title was a right to redeem. But a mortgage in fee is a conveyance of real estate ; it is in its nature assignable and transferable ; and by a legal assignment, the fee vests in the assignee ; an estate which cannot be divested by the release of the original mortgagee. By Rev. Sts. c. 107, § 14, "the person entitled to redeem the estate shall pay to the mortgagee, *or to the person lawfully claiming or holding under him*, the whole sum." It appears that the alleged payment was made June 23d 1840, and the assignments of the mortgage were recorded April 28th 1840, two months before. He had therefore full con-

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structive notice of the assignment of the mortgage. He was bound only through the mortgage of his real estate; and of the transfer of real estate, registration of the deed is conclusive evidence of notice. Had he, when he made this payment, inquired for the note, he would have found that the promisee had it not in his possession; had he inquired for his own original deed, he would in like manner have found that it was not in the possession of the original mortgagee, or if it was, that it had an assignment, duly executed, indorsed upon it. In every point of view, in which it can be considered, we think it was a payment in his own wrong, and if made without the actual request of the defendant, he could not have recovered the amount of him, because it was not made for his use, did not discharge his debt, nor enure to his benefit. We are therefore of opinion, that the defendant cannot avail himself of it, as a payment, in defence of this action.

PHINEHAS STONE vs. OTIS H. DANA & another.

The Rev. Sts. c. 142, § 3, which direct that search warrants shall command the officer, to whom they are directed, to bring before a magistrate stolen property, or other things, when found, "and the persons in whose possession the same shall be found," have made no such change in the law as to render necessary any alteration in the form of such warrants. It is still proper to insert in a search warrant the name of the person in whose building, &c. the complainant swears that he suspects the goods are concealed, and to order the officer to arrest such person, if the goods are found in his possession.

An officer returned on a warrant directing him to search the buildings of S. for certain described stolen goods, "By virtue of this warrant, having made diligent search and found three pieces of goods in the house of the within named S. and arrested the body of the within named S. and have him," &c. *Held*, that this return furnished *prima facie* evidence, at least, that the officer had found three pieces of the goods described, and that he was therefore justified in arresting S. and carrying him, with those goods, before a magistrate.

Where one, who has been arrested on a search warrant, and carried before a magistrate and discharged, brings an action of trespass against the officer, who justified under the warrant, he may, for the purpose of showing that the officer was not justified by the warrant, give evidence that the goods seized on the warrant did not come within the description of those for which the officer was directed to search: But he cannot, for such purpose, give evidence that the goods, so seized, were not those which were in the mind of the complainant, when he made the complaint and obtained the warrant.

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When an officer seizes goods on a search warrant, which correspond with and come within the description of those for which he is commanded, by the warrant, to search, he is not liable to an action, though the goods so seized by him may not be the same which were lost by the complainant.

TRESPASS. The first count in the declaration alleged that the defendants made an assault on the plaintiff, and arrested him in his dwellinghouse, under the false pretence that they had a search warrant, and carried him before a magistrate and obliged him to procure bail, &c. The second count charged the defendants with breaking into the plaintiff's dwellinghouse and arresting him on the same false pretence. The third count was for an assault and battery merely. The defendant Dana pleaded the general issue. Charles Sanderson, the other defendant, filed the like plea, with a specification of his defence, justifying under a search warrant put into his hands and executed by him as a constable of the town of Charlestown.

The complaint, warrant, and return thereon, which are copied in the margin,* were given in evidence at the trial, in support

* To Ephraim Buttrick, Esq., one of the justices assigned to keep the peace in and for the county of Middlesex, Otis H. Dana of Boston in the county of Suffolk, on oath informs the said justice that the goods mentioned in the schedule annexed, of the value of one thousand dollars, the property of the said Otis H. Dana & David N. Fales, have within fifteen months last past been feloniously taken, stolen and carried away out of the store of them the said Fales and Dana, at Boston aforesaid, and that he hath probable cause to suspect, and doth suspect, that said goods or a part thereof are concealed in the house, barn and out buildings of Phinehas Stone of Charlestown in said county of Middlesex, and prays a warrant to search there for the same.

Otis H. Dana.

Received and sworn to, the twenty fifth day of November, Anno Domini 1839.

Before me, Ephraim Buttrick, Justice of Peace.

Middlesex ss. To the Sheriff of the county, or to either of the constables of the town of Charlestown in said county, Greeting.

In the name of the Commonwealth of Massachusetts, you are required forthwith, with necessary and proper assistants, to enter in the day time into the barn, house and out buildings of Phinehas Stone mentioned in the above information, and diligently to search for said goods, and if the same or any part thereof shall be found on such search, that you bring the goods so found, together with the body of said Phinehas Stone (if he may be found in your precinct) before me or some other justice of the peace in and for the county, to be dis-

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of the defence. It was also shown that the averment, in the complaint, that the property therein mentioned had been stolen, was inserted by mistake, and that after the plaintiff was arrested on the warrant and brought before the magistrate, a new complaint was substituted, by consent of the plaintiff, in which it was alleged that said property had been obtained, by one Silas Stone, from said Dana and Fales, by false pretences, and taken and carried away from their store in Boston.

The judge, before whom the trial was had, ruled that the jury should consider the warrant as void, &c., whereupon a verdict was returned for the plaintiff, subject to the order of the whole court.

Brigham, for the defendants. The search warrant was in the form which the treatises on criminal law prescribe, and which has long been used in England and in this Commonwealth. 4 Burns Just. (20th ed.) 177. 3 Williams Just. 861–864. 3 Dickinson Just. (2d ed.) 503. 505. 1 Chit. Crim. Law, 65. Davis Just. (1st ed.) 218. Bolton's Practice of the Criminal Courts, 8, 9. Archb. on Commitments and Convictions, 41. 2 Bouvier's Law Dict. 384. The question is, whether a different form is required by the Rev. Sts. c. 142, § 3, which direct that such warrant shall (among other things) command the officer to bring before the magistrate the property and "the persons in whose possession the same shall be found." It is manifest from the commissioners' notes to this chapter, that they intended no change in the process, but merely an extension of it to certain

posed of and dealt with as to law and justice shall appertain. You are also required to notify the informant to appear and give evidence touching the matter contained in the above complaint, when and where you shall have the said goods and person, or either of them.

Given under my hand and seal at Cambridge aforesaid, the twenty fifth day of November A. D. 1839.

Ephraim Buttrick, Justice of Peace

Charlestown, Nov. 25, 1839. By virtue of this warrant, having made diligent search and found three pieces of goods in the house of the within named Stone, and arrested the body of the within named Stone, and have him before Ephraim Buttrick, Esq.

Charles Sanderson, Constable.

new cases. And a warrant, which should direct an officer to arrest, &c. a person in whose possession goods might be found, without naming him, would be void, and contrary to the 14th article of the Declaration of Rights, and to the 4th article of amendments of the constitution of the United States. *Bell v. Clapp*, 10 Johns. 263. *Sanford v. Nichols*, 13 Mass. 286.

A. Cushing, for the plaintiff. The warrant was void on its face, because its directions to the officer were not according to the provisions of Rev. Sts. c. 142, § 3. The directions should have been, to bring before the magistrate the person in whose possession he might find the goods. No name should have been inserted. The magistrate cannot judge, beforehand, in whose possession the goods may be found. See Davis Just. (1st ed.) 46, 47. Rev. Sts. of New York, Vol. II. 746. 7 Dane Ab. 245, note.

When a process is void on its face, the officer who serves it, and all concerned, are trespassers. *Grumon v. Raymond*, 1 Connect. 40, and cases there cited.

DEWEY, J. Whatever doubts may formerly have existed as to the legality of search warrants, they have long been sanctioned as a necessary and useful power to be exercised under the authority of magistrates having jurisdiction in the matter of arrests in criminal cases. The authority for issuing such warrants is found not only in judicial decisions, but to this is superadded the authority derived from direct legislative enactment. Rev. Sts. c. 142. English St. 22 Geo. III. c. 58. The form of such warrant and the mode of service of the same are fully stated in 2 Hale P. C. 113. Dalt. Just. c. 169. 1 Chit. Crim. Law, 64-66. Davis Just. (1st ed.) 44-48. Upon inspecting the warrant issued in the case before us, it seems to be substantially like the forms long used, and sanctioned by the best precedents.

Independently of the objection made by the plaintiff, there could be no question, as we can perceive, as to its correctness in point of form, or as to the authority for issuing it, and relying upon it as a justification for those acting pursuant to its requirements. The objection relied upon is, that the warrant does not conform

to the Rev. Sts. c. 142, § 3, which, it is contended, have introduced new provisions as to the form of the process. It is said that the statute only authorizes the officer, who serves the precept, "to bring such stolen property, when found, and the persons in whose possession the same shall be found, before the magistrate who issues the warrant, or some other magistrate having cognizance of the case;" and that this will not justify the issuing of a precept naming a particular person, as the individual to be arrested, if the stolen goods are found upon making search. The inquiry then arises, whether the revised statutes have introduced any new principle requiring a change in the form of the warrant in these cases. No suggestion of such alteration is made by the commissioners, in their notes accompanying the revision. No do we think that the words necessarily import any such change, but that, on the contrary, they are intended to be understood as requiring substantially the same forms, as those used in the well known and established books of precedents. The naming of the individual, who is required to be arrested, would seem to give a greater security against improper arrests. To give the general power to arrest a person, without mentioning him by name, or by any other description than "the person in whose possession the property shall be found," would leave a much greater latitude for the discretion and judgment of the officer, than the form used in the present case. It would be less in accordance with our Declaration of Rights, article 14, requiring that all warrants "to make search in suspected places, or to arrest suspected persons, or to seize their property," must be "accompanied with a special designation of the persons or objects of search, arrest, or seizure"; and also with the 4th article of amendment of the constitution of the United States, providing against unreasonable searches and seizures, and requiring that "no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The court are of opinion that this warrant ought not to have been held void, but that it was sufficient, in point of form, to

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sustain the defence, if the proceedings under it were regular and conformable to law. *New trial granted.*

A new trial was had at April term 1843. The defendant Dana added to his plea of not guilty a notice, that if there should be any evidence that he assisted Sanderson, the other defendant, in the execution of process, or in arresting the plaintiff, he would justify under a legal precept directed to said Sanderson, and as his assistant in the execution thereof.

The genuineness of the search warrant was proved by the testimony of Mr. Buttrick, who issued it. And it was testified by two witnesses, that both the defendants went to the plaintiff's house, and made their business known to him; that Sanderson read the search warrant to the plaintiff; that both defendants then proceeded to search the house for goods, and found three pieces, viz. one pattern of broadcloth, one pattern of pilot cloth, and a piece of bleached cotton cloth of about thirty yards; that the defendant Dana could not identify the goods, and sent to Boston for one Ryan, who was clerk of Dana and Fales when they sold goods to Silas Stone, and knew their marks; that said Ryan came, and told Dana said three pieces of cloth were those which he (Dana) had sold: That Sanderson, by Dana's order, took those pieces, and that they both went away; and that Sanderson returned, about two hours afterwards, and arrested the plaintiff.

It appeared in evidence, that Sanderson took the plaintiff before Mr. Buttrick, at Cambridge; that the plaintiff gave bail for his appearance at a future day; and that after two or three adjournments of the examination, the plaintiff was discharged.

The defence was, that the complaint and warrant were regular, and justified the search of the plaintiff's house; and that the defendants, on finding a part of the goods, were warranted in arresting, &c. the plaintiff; that if the complaint was false, malicious and groundless, it would not sustain this action—more especially against the officer, who was bound to obey a lawful warrant, good on the face of it, and directed to him.

The defendants proved and offered the complaint, the schedule annexed thereto, (in which numerous articles were mentioned, that were not found in the plaintiff's house,) the warrant and the return — as in the margin, *ante*, 99, 100.

The plaintiff then proposed to give evidence that the goods mentioned in the return were not the same goods which the officer was required, by the warrant, to search for; and he contended that the return of the officer was not conclusive evidence, nor even competent evidence at all: *First*, because the return did not, on the face of it, purport to aver affirmatively that the goods, which the officer found, were *the said goods* that he was required to search for, and therefore that the conditional authority for arresting the plaintiff, if the goods described were found in his possession, did not exist, and that the arrest was not warranted by it. *Secondly*, that if the return did so aver, yet it was not conclusive.

It was ruled by the judge, who presided at the trial, that though the return was illiterate and not free from doubt, yet, taken in connexion with the warrant, and the schedule which was part thereof, it did intend to aver that the officer had found three of the pieces of the goods described in the schedule annexed; and therefore that he was justified, by the warrant, in arresting the plaintiff, and carrying him, with the goods, before the magistrate.

The plaintiff then offered evidence to show that the defendant Dana, when he made the complaint, “had in his mind, and intended to describe, in the schedule annexed to the warrant, certain goods which Dana and Fales had sold to Silas Stone, in September and October 1838, which they claimed to have been obtained from them wrongfully; and that the goods, found and returned on the search warrant, were not parcel of the goods included in the invoices, so sold to Silas Stone.”

Upon this it was ruled that it was competent for the plaintiff to prove that the goods, so found and returned, did not come within the description of those included in the schedule, and required to be searched for; and if they did not, that the officer was not justified, by his warrant, in arresting the plaintiff; but

that it was not competent, in support of this action, and especially as against the officer, to prove that the goods in question were not those which the complainant had in his mind when he made the complaint and obtained the warrant; or that they were not parcel of those contained in the invoices of goods so sold by Dana and Fales; nor to show that the defendant did not take due pains to ascertain that the goods, so found, were not contained in said invoices.

The plaintiff thereupon became nonsuit, subject to the opinion of the whole court upon the correctness of these rulings.

The questions arising out of this second trial were argued and decided at October term 1843.

Choate, for the plaintiff. 1. The warrant did not authorize the arrest of the plaintiff, unless the *described goods* were found. Rev. Sts. c. 142, § 3. 1 Chit. Crim. Law, 66. Davis Just. (1st ed.) 47. 2 Hale P. C. 151. 19 Howell's State Trials, 1039, 1041, 1058. *Commonwealth v. Kennard*, 8 Pick. 133.

2. The officer's return does not duly aver the fact that the goods seized were the goods described in the complaint. And the court will make no intendment in favor of the return. On the contrary, the construction should rather be against the return. So are the analogies. *Davis v. Maynard*, 9 Mass. 246. *Purrrington v. Loring*, 7 Mass. 388. *Perry v. Dover*, 12 Pick. 211. Dalton's Sheriff, 168. 19 Vin. Ab. Return, O. Impney's Sheriff, 444. Watson's Sheriff, 50. *Greene v. Jones*, 1 Saund. 298. *Houghton v. Davenport*, 23 Pick. 237. *Kittredge v. Bellows*, 4 N. Hamp. 431.

3. If the court should hold that the return is sufficient yet it is not conclusive. *Whiting v. Bradley*, 2 N. Hamp. 82. *Brydges v. Walford*, 6 M. & S. 42.

4. The evidence, which was offered at the trial to control the return, was competent.

H. H. Fuller & Brigham, for the defendants. 1. *res pass* will not lie against these parties. *Stetson v. Kempton*, and *Sanford v. Nichols*, 13 Mass. 272, 286. *Putnam v. Man*, 3 Wend. 202. *Beaty v. Perkins*, 6 Wend. 382. *Sias v. Badger*, 6 N. Hamp. 393. *Livermore v. Bagley*, 3 Mass. 487.

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Plummer v. Dennett, 6 Greenl. 421. *Luddington v. Peck*, 2 Connect. 700. *Commonwealth v. Kennard*, 8 Pick. 137.

The return sufficiently shows that the officer acted within his warrant. He returned that *by virtue of the warrant* he searched, found, seized, &c. And this is sufficiently certain, though it is not expressly averred that *said goods* were seized. This point was settled in very early times. 1 Hen. VI. 6. Com. Dig. Return, E. 2. 1 Backus Sheriff, 260. *Wilson v. Law*, 2 Salk. 589. S. C. 1 Ld. Raym. 20. 19 Vin. Ab. Return, K : L. 2. Thel. Dig. lib. 16, c. 1, § 9. The law makes a liberal intendment in favor of ministerial officers. 2 Phil. Ev. (4th Amer. ed.) 296, 297, notes. *McDonald v. Neilson*, 2 Cow. 185. *Whittlesey v. Starr*, 8 Connect. 134.

The return is conclusive in this action ; especially in favor of the officer. *Stinson v. Snow*, 1 Fairf. 263. *Wilson v. Hurst*, Peters C. C. 441. *Wellington v. Gale*, 13 Mass. 483. *Purington v. Loring*, 7 Mass. 388.

If the evidence, offered by the plaintiff to prove that the goods taken were not those described in the schedule, because they were not in the mind of the complainant, be admissible, no officer could ever safely execute a search warrant. See *Hodges v. Holland*, 16 Pick. 395. *Adams Bank v. Anthony*, 18 Pick. 238. *Webster v. Randall*, 19 Pick. 13. *Price v. Messenger*, 2 Bos. & Pul. 158.

Choate, in reply. A liberal intendment is never made in favor of a return, in an action against the returning officer for an apparent trespass. In such cases, a strict construction is to be given. *Impey's Sheriff*, *ubi sup.*

The cases cited to show that a return of service on A., without stating him to be "the said A." are distinguishable from this. In those cases, nobody would suppose the officer believed he could make service on any other A. But in the present case, the officer might suppose, as his counsel now do, that he might seize goods that were *similar* to those described in his precept.

DEWEY, J. The first objection taken to the sufficiency of the defence set up by the defendants is, that the return of San-

person, indorsed upon his warrant, is upon the face of it insufficient, as it does not aver, directly, that the goods found and seized by him were those described in the precept under which he acted. It is contended by the plaintiff, that the return of a ministerial officer ought to be construed with great strictness, and that nothing should be left to intendment or inference. This position, under proper limitations, is undoubtedly well sustained. It has frequently been applied to cases where title to property wholly depended upon such return; and in such cases, and generally where the return is conclusive upon the rights of third parties, it must be direct, and also particular in stating the manner in which the duties have been performed.

But it seems to us that the present case is one where considerable liberality in construing a return may be reasonably and properly allowed, without danger of doing injustice to those concerned. The nature of the process, and the forms of proceeding under it, furnish adequate protection to the parties in interest. The form of the search warrant requires the officer, who serves it, to bring with him before the magistrate the goods seized on such warrant. If the return be defective, false or erroneous, as to the property, in any respect, the best evidence is at hand to control it.

Taking the mere return, disconnected with the other papers in this case, the objection might be urged, that it did not distinctly appear that the goods found and seized were the goods, or parcel of the goods, described in the complaint and warrant. But we think the return is not to be taken distinct from and disconnected with the precept and accompanying papers to which it was appended, but with reference to them. Indeed most returns, indorsed on precepts, will be found to require such reference to render them certain and full. They do indeed usually refer more directly to the precept itself; but we think it a reasonable intendment, that a return indorsed upon a warrant, or other precept, does apply to the precept on which it is so indorsed; and especially so where the return states, as the present does, that "by virtue of this warrant, having made search" &c. So it was held in a case in the year book, 1 Hen. VI. 6, where upon

a *scire facias* the return was "*scire feci* A. B.," without adding "within named"; but because it was said "by virtue of this precept as directed," the return was adjudged good. And this case was recognized in *Wilson v. Law*, 2 Salk. 589. Looking at the return in the present case, we find the officer professes to act "by virtue of this warrant." The warrant connects itself with the complaint and schedule of property annexed thereto; and the return, taken in connexion with these documents, furnishes at least *prima facie* evidence that the three pieces of goods found in the house, and taken by the officer and returned on his precept, were those described in the complaint and warrant, and which the officer was required to search for in the house of the plaintiff, and, if found, to bring them with the plaintiff before a magistrate.

The plaintiff's next position, that he had a right to show that the goods seized were other and different from those which the officer was by his precept required to search for, was fully conceded to him on the trial. Upon this point, we suppose, there can be no question. The right to seize the goods and arrest the plaintiff depended upon the condition precedent of finding, upon the search, such goods as were described in the search warrant, and in the place described; and without this, the officer would be a trespasser, if he took the goods, or arrested the body of the plaintiff. But the counsel for the plaintiff, at the trial, further proposed to show that Dana, the complainant, had in his mind, and intended to describe, in the schedule annexed to the complaint and warrant, certain goods which Dana and Fales had sold to one Silas Stone, at a particular period of time; and that the goods found, and seized on the search warrant were not parcel of the goods so sold to Silas Stone; and he contends that upon this ground he may well maintain that the arrest was illegal.

Taking this proposition in the language here stated, it would seem, on its face, to present a point which could not be seriously urged, especially against the officer serving the precept. To require an officer to serve a process like this, at the hazard of liability to be held responsible in an action of trespass, if the

property taken on the warrant was not the same that was in the mind of the complainant at the time of making his complaint, though it might be the same which was actually described in the search warrant, would be imposing a very onerous liability upon the officer.

The argument of the counsel for the plaintiff has now been directed to the discussion of another question, which he contends is presented by the report, and which it was doubtless intended to present, and which the court have considered; viz., that it was competent for the plaintiff to show that the goods taken by the officer, though corresponding, in description and kind, with the articles directed to be searched for and seized, yet were really other and different articles from those which the complainant had lost.

It is strenuously urged that the protection of the citizen from oppressive proceedings under this process requires the enforcement of the principle, that the party should proceed at his peril in this respect, and that in the service of such precept he must not intermeddle with the goods in the possession of another unless it is made certain that they are the identical goods stolen, or obtained by false pretences, &c. But we think this is pressing the point of responsibility too far; certainly much beyond the ordinary principles which govern proceedings in criminal cases.

Suppose the ordinary case of a warrant to arrest, founded on a direct charge of larceny by A. and that the officer, who arrests A. should, under the provisions of Rev. Sts. c. 126, § 25, seize certain articles, corresponding with the articles charged to be stolen, found in A.'s possession; but that upon the hearing before the magistrate, A. should show clearly that the goods found in his possession were not stolen goods, and that he had been guilty of no larceny. No liability to an action of trespass would, in such case, attach either to the officer or the complainant.

The great security of the citizen from unreasonable arrest or seizure of goods is this, that the warrant is only to issue upon the oath of the complainant alleging a larceny, &c., and his be-

lief that the party accused is guilty of the offence ; or, in case of seizure on a search warrant, that he believes the property stolen, embezzled, &c., to be in the place to be searched. If such oath can be properly taken, it lays the foundation for a criminal proceeding which, however unfortunate and injurious it may be to the party upon whom it bears, does not subject either the complainant or the officer to an action of trespass. If the prosecution be malicious and without probable cause, an action on the case will lie for the party aggrieved ; but if it be honestly and properly instituted, the party accused, though innocent, may be remediless.

It seems to us that the duty of the officer, and those acting in aid of him in executing a search warrant, is well and legally discharged, if upon making the search required, and finding goods corresponding in description with those directed to be searched for, he seizes such goods and brings them, with the person whose premises he is directed to search, before a magistrate for further proceedings. The officer is not made the judge, in the last resort, of the identity of the goods seized with those stolen. That must often be a matter of great uncertainty and difficulty, and upon the issue of which the whole question of the guilt or innocence of the party charged may turn. It therefore would furnish no answer to the justification relied on by the defendants, if the plaintiff could show that the goods seized, though corresponding with the description of the articles alleged to have been stolen and found in the place directed to be searched, were not the same, but in truth a different parcel of goods.

Nor do we think that it was competent, in answer to the justification here set up, for the plaintiff to show that the defendants did not take due pains to ascertain that the goods found were not contained in the invoices of goods sold by Dana & Fales to Silas Stone. The party serving the process was to look at the description of the articles, as set forth in the warrant and the documents to which reference was made in the warrant. He had no right to take the property or person of the plaintiff, unless, upon making the search, he found articles corresponding with those thus described in his precept. If he did find such,

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that was sufficient to justify his seizure ; and upon that he may rest his justification.

In cases where the proceedings are malicious and without probable cause, as has been already suggested, the proper remedy is an action on the case ; but if no sufficient facts exist to authorize such an action, it is the misfortune of the party to have been thus charged, or to have had his goods seized ; but one for which he may be without redress.

We see no objections to the instructions of the presiding judge, in matter of law, and the nonsuit will therefore stand.



HORACE HEARD vs. WINDSOR FAIRBANKS & another.

Though standing corn and potatoes in the ground may be attached on mesne process, if they are fit for harvest, yet a valid attachment can be made only by severing them from the freehold, and keeping them in the officer's custody.

THIS was an action of trover, brought by a deputy sheriff and the case was submitted to the court on the following agreed statement of facts : On the 9th of October 1841, a writ against Ebenezer Whitney, one of the defendants, in favor of Ebenezer Loker, and returnable before a justice of the peace on the 16th of said October, was delivered to the plaintiff for service. The plaintiff, on said 9th of October, went into a field, belonging to said Whitney, in which there was then a quantity of corn standing and fit to be harvested, and a quantity of potatoes in the ground, fit to be dug, and in writing appointed Isaac Coggin as his agent to keep said corn and potatoes, as attached by him on said writ ; and said Coggin agreed so to do. The plaintiff duly returned the writ, stating in his return, that he had attached certain corn and potatoes ; which are the same that are mentioned in the plaintiff's declaration. At the time of said attachment, the defendant Fairbanks held a mortgage, made by said Whitney, of the produce of the land (for the year 1841) in which said corn and potatoes grew, which mortgage was duly recorded, and is still in force.

On the 14th of October 1841, the defendants went upon said

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land, gathered the corn and potatoes, and carried them away, though they were told by said Coggin that the same had been attached by the plaintiff, and that he (Coggin) was appointed keeper thereof, and though Coggin forbade them to carry the same away.

Judgment in the suit against said Whitney was duly rendered on the 16th of October 1841, and execution thereon was taken out and delivered to the plaintiff, within thirty days, with directions to levy it on said corn and potatoes. But the plaintiff could not find said property ; and he returned the execution unsatisfied, and it still remains so.

Mellen, for the plaintiff.

Josiah Adams, for the defendants.

HUBBARD, J. It has been contended in this case that the property, which the plaintiff claims to have attached, was a part of the realty, and therefore that the intended attachment was unavailing ; and many authorities have been cited on both sides, as to the legal character and nature of property growing upon land or connected with real estate. In the case of *Miller v. Baker*, 1 Met. 32, where a question arose as to the attachment of trees and plants, Dewey, J. in giving the opinion of the court, says, "whether they might be attached without an actual seizure and taking possession, being considered as falling within a class of personal property that cannot easily be removed, (as buildings erected on the land of another,) may be a subject for consideration in some future case." But we do not think the present case calls for a discussion of the question. In the case of *Penhallow v. Dwight*, 7 Mass. 34, the court decide that "corn or any other product of the soil, raised annually by labor and cultivation, is personal estate, and would go to the executor, and not to the heir, on the decease of the proprietor ; it is therefore liable to be seized on execution, and may be sold as other personal estate. An entry for the purpose of taking unripe corn or other produce, which would yield nothing, but in fact be wasted and destroyed by the very act of severing it from the soil, would not be protected by this decision." As a general rule, what may be taken in execution may also be attached ; and there is

no doubt but what standing corn and potatoes in the ground, *and both ripe for harvest*, are the subject of attachment.

But the question to which our attention has been principally directed is, whether in this particular case there was in fact a valid attachment. The return, in point of form, may show an attachment ; but as between the owner and the officer, when the question arises, then the officer must show what he in fact did, to justify his return. In the present instance, the officer went into the field where the corn and potatoes were growing and fit to be harvested, and in writing appointed one Coggin as his agent to keep said corn and potatoes ; and Coggin agreed to do it.

An attachment, in its very terms, implies the taking of possession of the property by the officer, and the keeping of it in his custody, so as to give him a qualified ownership in it, and the right of possession, until the action between the parties to the suit, on which it is attached, is determined by law, or by the agreement of the parties ; and he may employ an agent or servant to keep the goods and chattels for him. But still his possession must be continued, or the attachment will be released. *Lane v. Jackson*, 5 Mass. 163, is a leading case on this subject, where the court say, "we are all of opinion, that to constitute an attachment of goods, the officer must have the actual possession and custody. This results from the legal import of the word ; and in this sense it is now to be understood. There certainly ought to be the same possession and custody on attachment, as on seizure by execution ; otherwise, an officer attaching would not be obliged by law to seize on execution because he had attached. But goods seized on execution must be sold at the expiration of four days after seizure, and the officer cannot sell unless he can deliver the goods to the purchaser." There are some cases which seem to speak a contrary doctrine, and in which attachments have been sustained, where the property, though personal, was not reduced to the actual possession of the officer ; such as the attachment of blocks of granite, a house on another person's land, a barn full of hay, &c. *Hemenway v. Wheeler*, 14 Pick. 408. But these decisions were

not intended to disturb the law requiring the officer to take possession of personal property, but were merely relaxations of the rule on the subject, owing to the ponderous and bulky nature of the property to be attached ; and to meet such cases, adequate provision is now made in the Rev. Sts. c. 90, § 33. But in the case at bar, no such cause existed, and there is no reason for applying the doctrine of those cases at the present time. The officer making the attachment would probably now be held to adopt the provisions of those statutes, as to ponderous or bulky bodies, and failing to do that he might be held to the actual custody of the property attached. In this instance, there was no difficulty in harvesting the corn or digging the potatoes. They were ripe and fit to be gathered. They were of no value without being gathered ; and the officer could make no use of them, for the purpose of giving effect to his attachment, without severing them from the freehold. The attachment made by him was merely symbolical, and he might as well have remained in his house, with Coggin at his elbow, to give a receipt for the property, and call that an attachment, as to do what he did. That merely going over a fence into a field is taking possession of corn growing in it, or of potatoes in the ground, is a position that cannot be maintained. To have completed his attachment, it was his duty to have taken actual possession of the property, and to have put it in a place of safety, and that within a reasonable time after the attachment ; agreeably to the spirit of the wholesome provisions of the colony law of 1641, Anc. Chart. 98, “ that no man’s corn or hay that is in the field, or upon the cart, nor his garden stuff, nor any thing subject to present decay, shall be taken in distress, unless he that takes it doth presently bestow it where it may not be embezzled nor suffer spoil or decay, or give security to satisfy the worth thereof, if it comes to any harm.” The officer had no more right to use the land or barn of the owner of the goods, for the custody of the property, without his consent, than that of a stranger. And supposing the attachment to have been rightfully commenced, still the possession was abandoned ; for an unreasonable time had elapsed before he made any attempt to reclaim the property, or to

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assert his right to the same. For though the writ, on which the attachment was intended to be made, was returnable to a justice's court, yet the officer could not judge how long it would be before judgment would be rendered, nor how much of the thirty days after judgment, (if the plaintiff should prevail,) before the execution might be delivered to him — during which time he would be responsible for the property.

Judgment for the defendant.

JOHN A. KNOWLES vs. PATRICK BYRNES.

Where a suit is brought against the maker of a note which has been indorsed to a firm, and the plaintiff describes himself as surviving partner of the firm, it is not necessary, (since the establishment of the rules of the court, at March term 1836,) that the declaration should aver either a demand of payment and a refusal; or the name or death of the other member of the firm; or that the defendant did not pay the note to the firm, while it continued, nor to the plaintiff, after the firm was dissolved.

THE defendant was summoned, on a writ dated December 24th 1841, to answer to the plaintiff, as "surviving partner of the late firm of Knowles & Locke, in a plea of the case; for that the said defendant, on the seventh day of February in the year one thousand eight hundred and thirty eight, by his note in writing, for value received promised one Stephen Castles to pay to him, or his order, the sum of twenty four dollars and fifty cents, on demand with interest; and the said Castles then indorsed the said note to the said firm; of which the said defendant then had notice, and in consideration thereof then promised the said firm to pay them the amount of the said note, according to the tenor thereof; yet he has not paid the same." Demurrer and joinder.

B. F. Butler, in support of the demurrer, cited *Bullock v. Jackson*, 1 Esp. Dig. 137, [260.] *Elstob v. Thorouggood*, 1 Ld. Raym. 284. Lawes Pl. in Assump. 263. 1 Saund. Pl. & Ev. 134. *Jell v. Douglas*, 4 Barn. & Ald. 374. 2 Chit. Pl. (6th Amer. ed.) 91, 92.

Beard, for the plaintiff.

SHAW, C. J. If this case were governed by the old rules of pleading, we should be inclined to the opinion, that this declaration would be bad on demurrer. No doubt it would be so, on special demurrer; but this is not a special demurrer, and it will be recollected that all special demurrers are abolished by St. 1836, c. 273, § 3. On general demurrer, several grounds are taken to the sufficiency of the declaration; amongst which, the principal are, that it does not allege who was the plaintiff's deceased partner, nor that such partner had deceased, nor that the amount of the note had not been paid to the deceased partner, in his lifetime, nor that the note had become due. Upon the common law rules of pleading, and the authorities cited, these would certainly be formidable objections. But the general course of modern decisions and rules of practice has been tending, more and more, to overlook technical rules and matters of form, and regard rather the substance of all pleadings, construed and understood in the same manner in which they would be usually understood; and by the Rev. Sts. c. 81, § 10, the supreme judicial court are authorized and enjoined from time to time to make rules for regulating the practice and conducting the business of said court, with a view to the attainment, amongst others, of the following improvements, viz., the simplifying and shortening of the pleadings and other proceedings, and the diminishing of costs.

Pursuant to this authority, the court passed a series of rules, at March term 1836, in Suffolk, which continued till late in the summer of that year. See 24 Pick. 398, & *seq.* By rule 47th it is provided that all allegations usually inserted in declarations, which are not material or traversable, and which the plaintiff would not be required to prove, may be omitted. Rule 66th provides, that all unnecessary and useless counts, and all unnecessary and useless averments or clauses in a declaration, may on motion be struck out, and that the plaintiff shall pay the cost of copies and all other costs occasioned thereby, whether stricken out or not.

Appended to these rules is a schedule of forms, given by way of illustration of the rules, understood to have been drawn up by

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an eminent jurist, to whom the public are largely indebted for the revised statutes — himself formerly a distinguished pleader. The declaration, in the present case, conforms very much to one of the precedents there given, that of a declaration by indorsee against maker, and entirely so in spirit and principle. 24 Pick. 403. It does not allege in terms, that the plaintiff was in partnership with Mr. Locke, and that he has deceased, but it does allege that the note was made payable to the late firm of Knowles & Locke, of which the plaintiff is survivor, which is the same in substance, and by necessary implication. So it does not aver, that the note was not paid to Mr. Locke in his life time, but it avers that the defendant has not paid the note; and the general proposition embraces the particular. So it does not aver that the note had become due, but that results from its date and time of payment, compared with the date of the writ. It does not allege a demand and refusal, but these averments would not be traversable, and therefore, by the rule, need not be made.

Demurrer overruled.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME JUDICIAL COURT
FOR THE
COUNTIES OF BRISTOL, PLYMOUTH, BARNSTABLE
AND DUKES COUNTY, OCTOBER TERM 1842, AT
TAUNTON.

PRESENT.

HON. LEMUEL SHAW, CHIEF JUSTICE.
HON. SAMUEL S. WILDE,
HON. CHARLES A. DEWEY, } JUSTICES.
HON. SAMUEL HUBBARD, }

ELIJAH INGRAHAM vs. JACOB DUNNELL & others

A landlord cannot maintain a bill in equity to suppress a nuisance caused to his property before he demised it, and continued afterwards, without joining his tenant as a co-plaintiff: And it seems, that after a hearing upon the merits of such bill, and after the expiration of the tenant's term, the landlord cannot be permitted to amend his bill by joining the tenant.

A party is not entitled to an injunction to restrain an injury caused to his reversionary interest in an estate by a nuisance, unless such injury will probably be irreparable, or cannot be compensated by damages recovered in a suit at law.

Where a bill in equity is brought, praying for an injunction to suppress a private nuisance, and it is doubtful, on the evidence, whether the defendant has not a good defence by prescription or estoppel, the court will not order a perpetual injunction, until the plaintiff has established his right to redress by a trial at law: In such case, if there is no valid objection to the bill, and there is danger of irreparable mischief, the court will direct an issue to be tried at law, and will order a temporary injunction to restrain the defendant in the mean time.

In a bill in equity, filed in August 1839,* the plaintiff set forth, that on the 3d of March 1837, he became seized and pos-

* The plaintiff amended his bill, after the defendants had filed an answer hereto, and the defendants filed an answer to the amended bill. The substance of both bills and answers is united in the text.

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sessed of a water mill and calico works on Beveridge Brook, in the town of Pawtucket, and of certain dwellinghouses, gardens, out houses, &c., near to said mill, and continued to be seized and possessed thereof, until March 1st 1839, when he demised the same to Horatio N. Ingraham, to hold for the term of three years, with a covenant for quiet enjoyment, "free from the adverse claims of all persons;" and that he still had the reversion thereof, after the expiration of said three years: That in the year 1826, the Pawtucket Calico Manufacturing Company, a corporation, became the owners of the land on which said mill, dwellinghouses, &c. are situate, and erected a dam on which said mill stands, and constructed the mill with machinery and rooms for bleaching, printing and callendering goods, and thenceforth were employed and continued to work the mill in bleaching, &c. goods, until the year 1829, when Dwight Ingraham became the owner thereof, who did not continue the same business therein, but put into the mill machinery fitted for manufacturing cotton goods, and from the year 1830 to the 3d of March 1837, manufactured cotton goods therein: That the plaintiff, after he became the owner of said mill, &c. until he demised the same, as above stated, worked the mill in manufacturing cotton goods; that, during all that time, the said houses, &c., were occupied by his workmen in the mill, and their families; and that said H. N. Ingraham, his tenant, since the demise aforesaid was made, has continued the manufacture of cotton goods in said mill, and that his workmen and their families have occupied said houses, &c.: That the waters of Beveridge Brook, at the time of the erection of said dam and mill by the aforesaid corporation, and at the time of the bleaching, &c., of goods there, as before mentioned, were pure and salutary, and proceeded from pure and limpid springs; and that the plaintiff was entitled to have the same flow to and by his mill and houses, free from noisome admixtures, smells and exhalations, for the purposes of cleansing, &c., the goods used and worked in the mill, and for the use of the workmen employed therein.

That the defendants on the 3d of March 1837, and ever

since, by means of their print works, mills and machinery, erected on said brook, above the plaintiff's said works, and of the materials wrought and used there, had impregnated the waters of the brook with noisome and unwholesome washes, drugs, dye-stuffs, &c., whereby said waters, running to the plaintiff's mill, and near his houses aforesaid, had become so foul, corrupt, unwholesome, and unfit for use, that the plaintiff and his workmen and tenants, and their families, could not use the same in so beneficial a manner as of right he ought; and that by reason of said conduct of the defendants, the plaintiff's wells of water, near his said houses, were rendered unfit for use, and the surrounding atmosphere was filled with noisome and unwholesome exhalations from said water, whereby said mill and the machinery therein became discolored and foul, and the health of the plaintiff's workmen was impaired: That, by the same means, the pond of water, raised by the plaintiff's dam, for the working of his mill, was filled with dregs and sediment, so as to impede its operations; and that his tenant aforesaid had threatened to abandon the mill and his lease thereof, and to refuse to pay the rent reserved.

The prayer of the bill was, that the defendants might be decreed so to operate their said mill, as not to injure the mill, works, workmen and houses of the plaintiff, and forthwith to cease impregnating said waters with unwholesome drugs, &c., or any foul admixtures.

The defendants, in their *answer*, (after objecting to the bill for want of proper parties,) admitted the plaintiff's title to the mill, houses, &c., in his bill mentioned, and that the waters of said brook proceeded from pure and limpid springs, which were above the defendants' mills; but denied that those waters, running to the plaintiff's mill at the time of the erection thereof, were pure and salutary: The defendants also averred, that in the year 1817 or 1818, a bleaching establishment was erected and put in operation, on the site of their print works, and that shortly afterwards and before the erection of the plaintiff's mill, the business of calico printing was there carried on, and ever since has been, in addition to the business of bleaching; and

that after the plaintiff's mill was erected, the water, which carried it at first, and has ever since carried it, passed from said bleaching and printing establishment, after having been used for the purpose of bleaching and printing, to the plaintiff's mill, and that by such use of the water by the defendants, it necessarily became impregnated with the various dye-stuffs and materials used in the printing and bleaching of goods : That in the years 1832 and 1833, the owners of the plaintiff's mill, and the owners of the defendants' print works, (under an agreement, hereinafter mentioned,) built a large reservoir above the defendants' pond, on said brook, in equal shares, which reservoir caused a large pond to be raised, which flowed back to the sources of the brook, covering a large surface of swampy land : That said reservoir was still continued and owned by the plaintiff and the defendants, for the benefit of their said several works below it, and that, being sometimes stagnant in the summer, it was offensive to the smell : That before the plaintiff became the owner of his mill, the former owners thereof caused three ponds to be raised on said brook, between the print works of the defendants and the plaintiff's mill ; that the upper pond, the water of which ran from the defendants' print works, was always stagnant, except when the gate was raised by the plaintiff to draw a part thereof into the pond next below, which, and also the lower of said ponds, was also stagnant, except the small part thereof which drove the wheel of the plaintiff's mill : That the plaintiff, and H. N. Ingraham, his tenant, had constantly used said ponds, ever since the plaintiff became the owner of his mill, and had exercised the sole control thereof : That the plaintiff, within a year or two next before the filing of his bill, changed the manner of taking the water to the wheel of his mill, by conducting the water through a canal from his upper pond to the lower side of his lower pond, and thence to said wheel ; thus leaving the whole surface of the middle and lower ponds, except a small space in the lower side of the latter, entirely stagnant the whole time, and useless to him.

The defendants admitted, that by reason of their use of dye-stuffs, &c., the water was discolored, and that some of the sedi-

ment, which ran off with the water, settled in the plaintiff's upper pond and tended to fill it up ; but they denied that the water was thereby injured for any purpose connected with the plaintiff's business of manufacturing cotton goods, or that the filling up of the plaintiff's upper or middle pond had done or would do him any injury in the operation of his mill, or that the plaintiff's wells were in any way injured by the impregnation of the waters of said brook with the dye-stuffs, &c., used by the defendants. They also denied that they caused the offensive exhalations complained of by the plaintiff, (the existence of which, during warm weather, they admitted,) and averred that the same were caused by the plaintiff's retention of the water, in his ponds, as above stated. The defendants also denied that any noisome and unwholesome exhalations from said water had discolored and rendered foul the machinery in the plaintiff's mill, or impaired the health of his workmen, except what might have been caused by the plaintiff's detaining the water as aforesaid.

The defendants further stated, that they, and those under whom they claimed, had erected "various and many dams, mills and other buildings, and put machinery and other apparatus thereon and therein, on the site of their print works, of great value and at great expense, to wit, exceeding the sum of \$200,000 ;" and that the same were still kept and maintained by them for the purpose of bleaching and printing calico.

The defendants also averred, that on the 23d of May 1832, Dwight Ingraham, who then owned the plaintiff's mill, &c., and Royal Sibley, who then owned the defendants' print works, made the agreement, (herein before referred to,) with Willard Jenks, an owner of land on said Beveridge Brook, above the works of the defendants, in which agreement it was stipulated that said Dwight and Royal should erect and maintain a dam across said brook, on land of said Jenks, for the purpose of maintaining a reservoir of water for the use, in the first place, of said Royal's bleaching and printing works, and after for the use of the mill of said Dwight ; and that said Royal should be permitted to raise the dam and the water three feet, at his said works, for the purpose of increasing and extending the same : And that after-

wards, on the 22d of August 1832, it was covenanted and agreed by and between the said Dwight and Royal, that after said Royal had raised his said dam three feet, he should have a right to lower his mill wheel, at said print works, three feet, with the view and for the purpose of further extending and enlarging said works ; and that in consequence of the said agreements and covenants, the said Royal, with the knowledge and consent of said Dwight, expended large sums of money, in the erection and maintenance of said reservoir, and in lowering the wheel at said works, and in enlarging and extending the works ; the said Dwight then knowing that said works were to be used for the purpose of bleaching and printing, as they theretofore had been.

A *replication* was filed by the plaintiff, and evidence was taken and published.

The argument was had at the last October term.

Eddy, & J. Whipple of Rhode Island, for the plaintiff.

B. Rand & Coffin, for the defendants.

WILDE, J. This is a case of importance, as it concerns property of great value, in the lawful enjoyment of which each party is entitled to protection. But as the parties have opposite interests, and the free exercise of their rights and privileges, respectively claimed, is incompatible, it will follow that however the case may be decided, one or the other of the parties will be subjected to a loss of property, or other consequential damages, which may be very considerable. We have, therefore, taken time to look into the authorities cited, and to consider the case with attention and deliberation, in the hope that we might come to a decision, which would terminate the present controversy, and so settle and establish the rights and privileges of the parties as to prevent future litigation. We have, however, met with difficulties in our way, which are not to be overcome, without disregarding some of the rules and principles of equity which seem to be well established, and which in their general operation are just and salutary. These we are not at liberty to disregard ; for although courts of equity are invested with large discretionary powers, yet they are not to be exercised arbitra

rily, but are to be governed and restrained by general rules of decision, so that a uniformity of judgment may be preserved, and parties may know their equitable as well their common law rights and liabilities. We are then to consider and determine whether upon the facts established by the evidence, or by the admissions in the pleadings, the plaintiff is entitled to the relief prayed for, according to the established rules and principles of equity ; or whether his appropriate remedy for the grievances complained of is not by an action at law.

The defendants are charged with the continuance of a nuisance to the plaintiff's water mill and works for the manufacturing of cotton goods, from the 3d of March 1837, to the time of the filing of the bill, by polluting the waters of the stream on which the plaintiff's mill was situate, and above the same, by impregnating the same with sundry noxious and unwholesome drugs, dye-stuffs, and other noxious preparations, whereby the water of the stream, running to the plaintiff's mill, had become corrupt, unwholesome and unfit for use, and so that the plaintiff, with his workmen and tenants, and their families; could not have the use of the same in so wholesome and beneficial a manner as he of right ought to have.

The plaintiff remained in the possession and occupation of his mill and works until the 1st of March 1839, when he demised the same to Horatio N. Ingraham for the term of three years ; and the first question is, whether the plaintiff is entitled, in this suit, to damages for the grievances alleged during this interval ; and we are clearly of opinion that he is not. Indeed on this point there can be no doubt. For the recovery of damages the plaintiff has a complete and adequate remedy at law, and that is the proper and appropriate remedy. Where an injury will admit of a pecuniary compensation, a court of equity will never interpose. And this principle is applicable to the alleged injury to the plaintiff's reversionary interest after his demise to H. N. Ingraham. Numerous cases were cited at the argument, to establish a principle, which no one can doubt, namely, that an action may be maintained by a reversioner for an injury done to his reversion. But his remedy is by an action

at law, and a court of equity will not interpose its authority, unless it can be shown to be necessary to prevent future mischief, and such a mischief as ought to be prevented. The foundation of equity jurisdiction on the subject of nuisance is the probability of irreparable mischief; that sort of material injury by one to the comfort of another, or to his damage, which requires the application of a power to prevent as well as to remedy the evil. Jeremy on Eq. Jurisd. 310. 2 Story on Eq. § 925. But to entitle the plaintiff to relief on this ground, the tenant must be joined as a co-plaintiff. A reversioner may have a separate action at law for an injury done to his reversion. *Jesser v. Gifford*, 4 Bur. 2141. But in a suit in equity, the tenant must unquestionably join. Indeed it may be doubted whether any such permanent injury appears to have been done to the reversion, as would maintain an action at law. The gravamen of the complaint is certainly of a transitory nature. But it is not necessary to consider this question; it being clear that this bill, as it is framed, without joining the tenant as a co-plaintiff, cannot be maintained.

It is averred in the bill, that H. N. Ingraham, the tenant, threatens to abandon the mill and his lease, and to refuse to pay rent. But he has no right so to do; for if the defendants' acts are unlawful, the tenant's remedy is against them. The plaintiff's covenant in the lease, that the tenant should quietly enjoy, free from all adverse claims, is only against lawful claims. 2 Saund. 178, note (8.) 6 Mass. 252.

The question then is, whether the plaintiff may have leave to amend the bill, by joining the tenant as a party. No motion for leave thus to amend has yet been made; and at this stage of the cause there are obvious objections to its allowance, which it would be difficult to avoid or overcome. Objection was made for the want of parties, in the defendants' first answer, and the plaintiff ought then immediately to have moved for the proper amendment, before issue joined and examination of the witnesses; and most certainly, before a final hearing on the merits. And now there are also technical difficulties and objections to the amendment. The lease having expired, there is no longer

any necessity of joining the tenant ; for he has his remedy at law for damages, and has no right to the interposition of the court by injunction ; so that if the plaintiff should have leave to amend his bill by making his former tenant a party, he must then apply for leave to file a supplemental bill, stating the expiration of the lease, and thus to make and unmake a new party without any change of circumstances. And unless this may be allowed, the bill cannot be sustained ; for the plaintiff must show a good right to maintain his suit at its commencement.

But supposing these difficulties might be obviated by an amendment of the bill, another objection remains, on which the defendants' counsel rely, which appears to be sustained by the authorities. The defendants' counsel maintain that they have a good defence at law ; and they contend that they have a good title by prescription, and by estoppel under the indenture between Dwight Ingraham and Royal Sibley, from whom the parties respectively derive their titles. And the defendants deny also, in their answer, that the impurity of the water in the stream, and the offensive exhalations therefrom, were caused by them, but that they arose from the stagnation of the water in the plaintiff's ponds.

Whether, upon the facts proved or admitted, the defendants could maintain this defence, in an action at law for the nuisance alleged, is a question upon which we give no opinion ; but the right is sufficiently doubtful to entitle them to a trial at law. A court of equity is extremely unwilling, as Eden remarks, to interpose without a trial at law, especially where the alleged nuisance consists in the exercise of a manufacture. Eden on Injunctions, 236. More especially, it may be added, where the works complained of are of great value, and a perpetual injunction might be ruinous. And in all cases, where the right is doubtful, the court will direct a trial, and in the mean time, if there be danger of irreparable mischief, or if there is any other good cause for granting a temporary injunction, it will be ordered, so as to restrain all injurious proceedings ; and when the plaintiff's right is fully established, a perpetual injunction will be decreed. 2 Story on Eq. § 925. Mitf. Pl. (3d ed.) 111.

 Jackson v. Rounseville & others.

If then the present case depended solely on this last ground of defence, the question would be, whether the bill should be now dismissed, or the proceedings should be suspended until the plaintiff's legal right and the defendants' liability should be determined by a trial, on an issue to be framed for that purpose. This latter course might be proper, if there were no objections to the bill, and a ground appeared for a temporary injunction to restrain the operations of the defendants' works. But no such ground appears in the present case. And when we consider the objections to the bill, and to the allowance of an amendment, at this late stage of the proceedings, (which, if allowed, ought not to be allowed without the payment of costs,) we are of opinion that the bill must be dismissed, leaving the plaintiff to seek his remedy at law, as he may be advised. And if he should establish his right, then an application may be made for an immediate injunction. In such a case, a temporary injunction would be ordered unless the defendants could show good cause against such an order.

Bill dismissed.

JAMES JACKSON vs. GAMALIEL ROUNSEVILLE & others.

Trespass quare clausum fregit is the proper action for the violation of the right of possession of pews which the Rev. Sta. c. 60, § 31, declare shall be real estate.

Where a meetinghouse is conveyed to trustees for the use of a certain church and society, for a place of public religious worship for such church and society, and for no other use, intent or purpose whatsoever, and in the deeds of the pews in such house, which are given to an individual, the provisions of the conveyance of the house are referred to and recognized, the pew-owner has a right to the sole use of his pews on all occasions when the house is occupied, though it be opened for purposes different from those mentioned in the conveyance thereof; and he has a right to exclude all others from his pews, on such occasions, by fastening the pew doors, or otherwise, in such manner as not to interrupt or annoy those who may occupy other pews; and any person who enters such pews, knowing the facts, is a trespasser, and liable to an action by the owner. So if the owner of such pews cover them in an offensive manner, for the purpose of excluding others, and any person, in removing the offensive covering do any unnecessary injury to the pew or its fixtures, he is liable to the owner in an action of trespass.

Quare as to the right of pew-holders, in meetinghouses generally, to the exclusive occupation of their pews when the house is opened for purposes not connected with public religious worship of the society which owns the house.

THIS was an action of trespass *qu. cl. fr.* in which the plaintiff, in three counts, complained that the defendants, on the 4th

of July 1838, broke and entered his three pews, numbered 42, 70 and 77, in the Central Baptist Meetinghouse in Middleborough, and removed certain fixtures which the plaintiff had placed there, and introduced strangers into said pews, and thereby injured them and the furniture thereof. The case was tried on the general issue, before *Morton*, J. whose report of the trial was as follows :

The plaintiff, to support his action, offered in evidence three deeds, of different dates, but all dated before the day of the trespass alleged in his declaration, made to him by officers, or an officer, of said society, and each conveying to him one of the pews in his declaration described. The plaintiff also gave evidence that before and up to the time of the alleged trespass, he had possession of said three pews in the manner in which pews are usually occupied. Each of said deeds contained a clause of the following purport : " It being understood that the meetinghouse is to be held, used, occupied and opened for public worship, pursuant to the provisions of an indenture made August 26, 1828, by which Levi Pierce conveyed said meetinghouse to trustees for the use of the Central Baptist Church and Society."

The indenture referred to in the deeds was then introduced. It was of four parts, viz. Levi Pierce, who conveyed certain land, and the meetinghouse and academy thereon, of the first part ; Peter H. Pierce and five others, of the second part, to whom said land and houses were conveyed upon the trusts and for the purposes in said indenture set forth, "*and for no other use, intent or purpose whatsoever*—namely, upon the special trust and confidence that said parties of the second part, the survivors of them, &c. shall and do permit and suffer the said meetinghouse and lot, and so much of the academy lot, as in their judgment shall be necessary for the convenient use of said meetinghouse, at all times hereafter to be used, *occupied and enjoyed as and for a meetinghouse or place of public religious worship, and service of the one living and true God, by the said Central Baptist Church and Society, under the ministration of the ministers that shall, from time to time, be elected and settled,*" &c.

The act incorporating the Central Baptist Society in Middleborough, (*St.* 1827, c. 96,) and the records of said society were introduced. By those records it appeared that the society accepted the act of incorporation, and that they organized and ever after acted under it. In April 1838, the society passed a vote that the meetinghouse should not be opened for any purpose except only for preaching, conference meetings, &c. and for the examination of the academy scholars, at the end of their summer term. On the 26th of June 1838, that vote was reconsidered, and it was voted, that it was "the sense of the society that the prudential committee have ever had, and now have, a right to open the meetinghouse for such purposes as they may think proper."

It appeared that in the afternoon of the 3d of July 1838, the plaintiff closed the tops of his said pews with boards which he caused to be thickly covered with paint; that he put a cleat across each pew door, on the inside, and two other cleats across each pew, which cleats were fastened with screws, and on which said boards were laid, and to which they were nailed; that "a paper was put upon the boards forbidding any person meddling with said pews;" and that the defendants, on the next morning, removed the boards and cleats from the pews.

It appeared from evidence introduced by the defendants, that a number of individuals associated together for the celebration of the 4th of July 1838; that a committee of arrangements was chosen for the purpose of procuring this meetinghouse, and of making the usual preparations for the celebration; that they applied to the prudential committee of this society for permission to use this meetinghouse on the occasion; that an answer, granting the permission asked, signed by two of the committee, dated June 28th 1838, was returned. It also appeared that said committee consisted of three, and that this answer was made without consulting the third, and without his knowledge. The three defendants, one of whom was a member of the committee of arrangements, acted by the directions of that committee in removing the boards from the pews.

After all the evidence on both sides was introduced, both as to the manner in which leave was obtained to use the meeting-

house, and as to the manner in which the boards, &c. were removed from the plaintiff's pews, the jury were instructed "that the plaintiff had shown a legal right to the three pews, and that the society had such a right to and control over the house, that they might grant the use of it for the celebration of the anniversary of the declaration of independence, so far that those to whom the use was thus granted would have the same rights and privileges which occupants of churches on such occasions usually have ; and that the permission or license, granted in this case by a majority of the prudential committee, gave them the privilege and right to occupy the house in the usual manner."

The jury were further instructed, "that the legal owner or holder of pews holds them subject to the rights and powers of the parish or society ; that the latter had the general superintendence and control of the meetinghouse — had the power and right to determine how often and at what hours on the Sabbath, and at other times, it shall be open for public worship — to select their pastor and to determine who, in his absence, shall be admitted into the pulpit, and to keep the house in a proper state and condition for public use : But that on such occasions, the pew-holder has a right to the exclusive use of his pews ; that he may occupy them by himself and family or by his friends ; that whether he thus occupies or not, he has a right to exclude others ; that he may do this by attending in person, or by his agent, and excluding them ; that he may effect the same object by locking or otherwise fastening his pews, or in any way prohibiting people from entering them ; and that, if any person, knowing such prohibition, enters, he will be guilty of a trespass."

The jury were also instructed, "that a parish or society may use, or suffer others to use, their meetinghouse for some other purpose than religious worship, and that the celebration of independence is one of the purposes for which they may use or allow others to use it ; that on such occasions, the pew-holders have, in relation to their pews, the same rights and privileges, but subject to the same qualifications, restrictions and control, as when the house is used for public worship. But that the pew-holder has no right to use his own pews in such manner as

to interrupt or interfere with others, in the proper or convenient use of the other pews ; that although he might lawfully take measures to secure his own pews, and exclude all others from them, yet, to accomplish this purpose, he would have no right to place such objects, or perform such acts, in his own pews, as would be offensive or injurious to others occupying the rest of the house ; and that, if the plaintiff, with an intent to interrupt, incommode, or in any way to interfere with the use and occupation of the house by others, or with a total disregard of their occupation and enjoyment of it, did perform such acts or place such objects in his pews as were offensive to the senses, or otherwise incommoded, interrupted or endangered the convenient occupation or enjoyment of it by others, in the use of the other pews, then those entitled to the use of the house would have a right to remove the offensive or injurious objects, without doing any damage to the pews."

The jury were further instructed, "that the plaintiff had a right to nail cleats across the pew doors to prevent people from entering, provided they were so placed as not to interfere with or interrupt any person without, and that to enter and remove cleats, thus put on for this purpose, would be a trespass. But if injurious or offensive objects were placed in the pews, the legal occupants of the house might lawfully enter and remove the whole objects together, although some portions of them were put there for other purposes, and when separated from the rest of the structure were inoffensive in themselves : But that the occupants had no right to do any more than was necessary to remove the nuisances, or offensive objects : And if cleats, which were made parts of them, had previously been put there for the purpose of fastening up the pews, and had, in removing the offensive structure, become separated from the rest, and remained, securing the pews, and were on the inside so as not to be offensive or injurious to those without, it would be a trespass to proceed and remove them. But if in removing the offensive or injurious structure, the cleats came away with the rest, it would be no trespass, although they were put there for the purpose of fastening up the pews."

The jury returned a verdict for the plaintiff. The defendants excepted to the above instructions, and also moved for a new trial because the verdict was against the weight of evidence. A full report of the evidence was annexed to the motion for a new trial.

This case was argued at Boston, January 12th 1842.

Hallett, for the defendants.

Eddy, (*Wood* was with him,) for the plaintiff.

SHAW, C. J. This is an action of trespass for breaking and entering the plaintiff's pews, in a Baptist Meetinghouse in Middleborough. It comes before the court, upon exceptions to the charge of the judge, and on a motion for a new trial because the verdict was against evidence. The verdict was for the plaintiff, with nominal damages.

This case hardly raises any question as to the *general rights* of the holders of pews in meetinghouses, as the meetinghouse in question, and the land on which it stands, are held under an indenture of four parts, very elaborately drawn, the general tenor of which is, that the premises shall be held and improved, for the use of a baptist meetinghouse, for public worship only.

The first question discussed was, whether an action of trespass *quare clausum fregit* will lie in such case. So long as pews are considered in point of law as real estate, as they are in this Commonwealth, except in the city of Boston, we can perceive no reason, why the actual form of action, given by the common law, to redress a wrong done to the right of possession of real estate, is not the legal and proper remedy. We are of opinion that the charge, in that particular, was correct. *Gay v. Baker*, 17 Mass. 435. Rev. Sts. c. 60, § 31.

Whether in legal right, in parishes and religious societies constituted in the usual way, the society has authority, by their committee or otherwise, to lend the use of their meetinghouse, and whether, in such case, the use of the house extends to the use of the pews, to the exclusion of the owners, for such an occasion, is a question which we think is not raised in the present case. It has been the practice in various parts of the Commonwealth, and especially in the city of Boston, for

religious societies to lend the use of their houses to the government, for the annual election sermon, and to various societies and philanthropic associations, to hold meetings for various purposes ; and upon such occasions it has been usual for the body or association, to whom the house is lent, to control the use of the pews, without regard to the particular owners. Perhaps loans of the use of houses of worship may be resolved into a mere practice of courtesy on the part of religious societies, and of voluntary acquiescence, amounting to an implied license on the part of pew owners, not affecting the legal rights of either. And perhaps it is more for the harmony and well-being of society, that the practice should stand on considerations of liberality and courtesy, than to discuss the question of strict law ; at least until a case occurs, which requires it. In the present case, there was conflicting evidence, both as to the authority of the committee, and as to the point whether, if they had that authority, they had duly exercised it, and as to the proceedings on the part of those to whom it was given. The evidence was left to the jury, under instructions from the court, in point of law, sufficiently favorable to the defendants, and we can perceive no legal ground, upon which they can claim to set aside the verdict, for any misdirection in matter of law.

As a verdict against the weight of the evidence, the court are of opinion, that the motion to set it aside cannot be sustained.

Judgment on the verdict.

MARY N. PARKER vs. JAMES PARKER & others.

A testator, after giving the use and improvement of all his real and personal estate to his wife during her widowhood, made the following residuary devise : " I give to my five sons all the residue and remainder of my real estate, to be equally divided among them, they to come into possession thereof when my wife's improvement ends : And if any or either of my said sons should die before they arrive to the age of twenty one years, or should die without any legal heir of their body, then and in that case their share or shares shall descend equally to their surviving brother or brothers." *Held*, that each of the sons took an estate tail in one fifth of the land devised, with cross remainders.

Held also, that if this clause in the will had given to the sons a fee simple, with a limitation over by way of executory devise, then the devise over could not have taken effect, unless one or more of the sons had died before coming of age and without lawful issue.

A devise of "all the residue and remainder of my real estate," passes a fee, though no words of limitation or inheritance are added.

A devise of real estate, without words of inheritance, passes a fee, if the devisee is personally charged, in the will, with the payment of money to third persons.

PETITION for partition, in which the petitioner alleged that she was seized in fee of two eighths of one fifth of several parcels of real estate therein described, as tenant in common with the respondents.

The parties agreed upon the following facts : James Parker, father of the petitioner and of the respondents, died in the year 1802, seized in fee of the real estate described in the petition, and of other real estate. He left a last will, which was duly proved and allowed, in which — after giving to his wife, Sarah Parker, in lieu of dower, the use and improvement of all his real and personal estate, during the time she should continue his widow, and to his son Ebenezer Parker, in fee, the remainder in certain parcels of land not described in the petition — he disposed of his remaining estate, in these terms :

" 3d. I give to my five sons, namely, Ebenezer, James, Timothy, Jonathan, and Nehemiah, all the residue and remainder of my real estate, to be equally divided among them ; they to come into possession thereof, when my wife's improvement ends. And if any or either of my said sons should die before they arrive to the age of twenty one years, or should die without any legal heir of their body, then and in that case their share

or shares shall descend equally to the surviving brother or brothers.

"4th. I give to my four daughters, namely, Mercy, Mary, Sarah, and Caroline, \$ 200 each, to be paid by my five sons abovenamed in one year after they come into possession of the real estate abovementioned, in equal proportion by my said five sons. And if any or either of my abovesaid daughters should die before they come into possession of the abovesaid sum of \$ 200 each, or should die without leaving any legal heir of their body, then and in that case, their share or shares shall descend to the surviving sister or sisters in equal proportions : And furthermore it is my will that my personal estate, the improvement of which I have given to my abovesaid wife, should be disposed of in the following manner, namely, all that remains of my stock and out-door moveable estate, at the end of my said wife's improvement, shall be equally divided among my sons abovementioned ; and all my household furniture and indoor moveable estate, it is my will that my said wife dispose of it in any way or manner that she thinks best."

In the year 1835, the abovenamed Nehemiah Parker died intestate, being more than twenty one years old, but without any issue, and leaving his mother, (the aforesaid Sarah,) and his aforesaid four brothers, and also three sisters, (of whom the petitioner is one,) his heirs at law. The said Sarah afterwards, by her deed, conveyed to the petitioner all the right which, as one of the heirs of said Nehemiah, she had in the real estate described in the petition. Said Sarah died in the year 1840.

It was agreed that if, on the foregoing statement, the court should be of opinion that the petitioner had any right in the real estate described in her petition, as an heir of said Nehemiah and grantee of said Sarah, then judgment for partition should be rendered ; otherwise, that the petition should be dismissed.

This case was argued at the last October term, and again at this term, by *Marston*, for the petitioner, and by *J. Reed*, for the respondents. The opinion of the court was delivered at the October term 1843.

SHAW, C. J. The present petitioner, one of the daughters

of the late James Parker of Barnstable, claiming to be tenant in common with her brothers, of various tracts and parcels of land, brings her petition and prays to have partition made, so that she may hold her share in severalty. She claims as heir to her brother Nehemiah Parker, deceased, of all that part of the real estate of their father, which he devised to his son, the said Nehemiah. The respondents deny that the interest which said Nehemiah took in his father's estate under his will, in the events which happened, was such an absolute estate in fee simple as would descend to his brothers and sisters as his heirs at law; and of course they deny the petitioner's right to have partition. This must depend upon the construction of the will, and the events which occurred after it.

It appears by the will, that the testator, after making a provision for his wife, and a specific devise to his son Ebenezer, disposed of the principal part of his estate as follows:

[The third clause in the will was here recited.]

The question which has been principally argued is this: Supposing this to be an estate to the widow for her life, determinable on the event of her marrying again, with a remainder to the sons in fee, but in case either should die under age, or not leave issue living at the time of his decease, then an executory devise over to the other sons—the question is, whether the devise over shall take effect, if he arrive at full age, but leave no issue. In behalf of the sons, it is contended that on the happening of either of these contingencies, it was intended that the devise over should take effect; whereas it is contended by the petitioner, that the two events were to form one contingency, and the first devisee must have died under age *and* without leaving issue, before the devise over could take effect. It must be admitted that a literal construction of the words of the will favors the former argument; but we are of opinion, that upon the authorities, as well as upon principle, the construction of the petitioner is the true one.

The principle, upon which this construction was originally adopted, was founded upon that great maxim, lying at the foundation of all the rules for construing wills, that the intention of

the testator, so far as it can be ascertained from the will, taking every clause and provision in it, and from the condition and circumstances of the estate, the relations of the testator with all the various persons concerned, shall govern and be carried into effect, as far as it can be done consistently with the rules of law. If the two facts of dying under age, and dying without leaving issue, were to be construed as two several and distinct contingencies, upon the happening of either of which, the devise over should take effect, it would follow, as a necessary consequence, that if the devisee should marry and have issue and die under twenty one, leaving such issue alive, the issue would not take the estate, because the dying under age is one of the events, on the happening of which the estate would pass over to the devisee, and thus the issue of the first object of the testator's bounty would be wholly cut off from taking the estate. This is so manifestly contrary to the presumed intent of the testator, that it cannot be adopted without adopting a construction which, adhering to the letter, would violate the spirit of the will. No. We think this is one of the cases, in which the word "or" will be construed to mean "and," in order to carry the testator's intention into effect. The manifest object of the testator was, we think, that if the son, who was the first object of his bounty, should die, without leaving children to take after him, and whilst he was under age so that he could not make any disposition of the property, on account of the incapacity of nonage, then the testator intended to make the disposition of it himself. But if the son should leave no such children, but still if he should arrive at an age, at which the law would allow him to dispose of real estate, by his own act, by deed or by will, then it was intended that the gift to him should be absolute, and the devise over would fail. *Soulle v. Gerrard*, Cro. Eliz. 525. *Price v. Hunt*, Pollexf. 645. *Barker v. Suretees*, 2 Stra. 1175. *Denn v. Kemys*, 9 East, 366. *Fairfield v. Morgan*, 2 New Rep. 38. This last case was decided, upon great consideration, in the house of lords. That "or" shall be read as "and," to effect the will and intent of the testator, was de-

cided in an early case in Massachusetts. *Ray v. Enslin*, 2 Mass. 554.

The case thus far proceeds on the ground that the devise to the sons, after the devise to the wife for life, was a remainder in fee, with a limitation over, by way of executory devise.

Had it been quite certain that this provision in the will of the testator constituted an estate in fee simple to the sons, with a devise over, in case either of them should die under age and without leaving issue living at the time of his decease, so that the only claim of the respondents to the estate was by way of executory devise, we are strongly inclined to the opinion, that the estate would have become absolute in Nehemiah, on his arriving at the age of twenty one years, although he afterwards died without issue ; and that the land, on his decease, would have descended to his heirs, including the mother and sisters. But upon a more careful examination of the will, the court are of opinion, that this provision in the will did not give a fee simple to the sons with a limitation over, by way of executory devise ; but that it gave to each of the sons an estate tail in one fifth, with cross remainders.

It is a settled rule of law, that a gift of real estate in a will shall never be construed to be an executory devise, which can be legally construed to be a remainder. 8 Mass. 38. *Purefoy v. Rogers*, 2 Saund. 388. We are then to examine this will to determine whether this was a devise in fee with an executory devise over, or an estate tail with a remainder.

In the first place, it is apparent, that in the principal devise to the sons, there are no words of limitation ; that is, it is not in terms devised to them and their heirs. But as it is a will, and not a deed, which we are considering, we are inclined to the opinion, that if it stood upon that clause alone, it would be sufficient to create an estate in fee simple, without words of limitation — for two reasons ; first, because it is a devise of all his real estate ; and secondly, because, by another clause in the will, he charges these devisees personally, with the payment of a considerable sum of money to their sisters ; which circumstances are regarded, for well known reasons, as legal *indicia* of an intent to give an estate in fee. 18 Pick. 537. 8 T. R. 1.

But we have already stated, that in construing a will, the whole is to be taken together, and one provision may be enlarged, restrained, or otherwise controlled, by another. Here the will, after giving the estate to the five sons, goes on to provide that if either of them should die without any legal *heir of their body*, then the share of such deceased son is given to the surviving brother, or brothers. In this clause, the term "legal heir of the body" is precisely equivalent to "lawful issue", that is, children or descendants. This clause qualifies the former, and indicates the intention of the testator to give the estate, not to each son and his heirs generally, but to each one and the heirs of his body. It creates an estate tail by implication. *Nightingale v. Burrell*, 15 Pick. 104. In saying that if the son dies without lawful issue, the estate shall go over, there is a clear implication that if in dying, such son does leave children or other issue, it shall not go over to the other sons; and the only intelligible reason there can be, is, because in that event, it was the intention of the testator, that such child or children should take the estate, after their father, as heirs of the body. If such be the effect and legal construction of the will, then the devise is an estate tail, and if not barred in some of the modes prescribed by law, it will descend to the heirs of the body, so long as there are any to inherit, and the gift over to the brothers would be a remainder, to take effect upon the determination of the estate tail by the failure of issue of the body. Such appears to us to be the true construction of this will. We think it manifest from the provisions of the will, that it was the intention of the testator to give the estate to his five sons in equal shares; but as it was uncertain who would marry and have children, and who not, that each should have his share of one fifth, for his own life at all events; that if he left children, they should have it; but if he should leave no children to take it after him, his brothers should have it. This was an estate tail in each of the sons.

The principal distinction, and it is a very important one, between an estate tail, with remainder, and an estate in fee, with a limitation over upon the happening of some event, as an ex

executory devise, is, that a party holding the latter — an estate in fee determinable upon a contingency — has no power to defeat the executory devise. He has himself an estate defeasible upon the happening of the contingency; he may alienate it, but his alienee will take it subject to the same condition. But the owner of an estate tail may, at his pleasure, bar the entail and defeat and cut off all the remainders, by a common recovery, or, under our statute, by a simple deed. *Nightingale v. Burrell*, 15 Pick. 116. But although a tenant in tail has a power to bar the entail and cut off the remainders, yet it is at his option to do so or not; and if he does not, the remainder over will take effect, according to the form of the gift and the nature of the estate. In the present case, by force of the will, Nehemiah Parker had an estate tail, with remainder to his four brothers. This entail was never barred by deed or common recovery. He died seized of the estate as tenant in tail, and leaving no issue to take after him, the estate went to the brothers, by way of remainder. We are therefore of opinion that no estate descended from Nehemiah to his mother or sister, as general heirs, that the petitioner had no interest in the devised estate, and that the petition must be dismissed.

SOLOMON ATTAQUIN & others vs. PHINEHAS FISH.

The authority given to the court, by the Rev. Sta. c. 81, § 8, and c. 105, § 14, to hear and determine in equity all suits and matters concerning waste, where there is not an adequate remedy at law, extends to cases of technical waste only, and not to those trespasses which courts, that have full chancery powers, restrain by injunction.

The authority given to the court, by the Rev. Sta. c. 81, § 8, to hear and determine in equity 'all cases in which there are more than two parties having distinct interests, which cannot be justly and definitively decided and adjusted in one action at the common law,' does not apply to a case where one is charged with a trespass upon land, and the question is, whether the land, if he has no title to it, is owned by certain individuals, as tenants in common, or by a municipal corporation.

BILL IN EQUITY. The plaintiffs were the selectmen of the district of Marshpee, and three others, proprietors thereof, who

complained for themselves and the other proprietors. They alleged, in their bill, that they were owners and tenants in common of the lands in said district, which were not held in severalty, and which were known as 'The Commons,' and that they had, through their progenitors, (the Marshpee Indians,) been in possession of said lands from time immemorial—the right to the fee therein never having been held or claimed by any other person : That they were in possession of a part of said lands, known as the parsonage lot, containing about 400 acres, and had not, by any act of theirs, ever parted with the fee or use of said lot : That they were placed under guardianship by the General Court, by *St. 1788, c. 38*, and deprived of all exercise of civil or religious liberty, as a community, and that they so remained until, by *St. 1834, c. 166*, they were established as a district, and reinstated in their civil rights : That they were also owners of two other parcels of land in Marshpee, one called "Santuet Field, and the other, Great Neck round Daniel's Island."

That by an act passed in the year 1763, [Mass. Temporary Laws, 181,] all the lands belonging to the Indians and Mulattos in Marshpee were made a district, by the name of Marshpee, said act to continue in force three years ; and that "during that period said Indians exercised the rights of self-government, until said act expired by its own limitation, and was never revived : " That afterwards, the proprietors of Marshpee were without any legal government, until the passing of the abovesaid *St. 1788, c. 38* : That in 1783, as appears by the records of the county of Barnstable, Lot Nye of Sandwich, a white man, and Matthias Amos and Moses Pognit, Indians, calling themselves selectmen, signed an instrument, purporting to allot, lay out and sequester forever, a certain tract of wood land, being 400 acres, lying within the plantation of Marshpee, and being Indian property, to lie as a parsonage forever, and to be used and improved for the sole purpose of the support of the gospel in said Marshpee, in all future generations, according to the discipline and worship of the church in that place, which is congregational, and to be forever for the purpose of propagating

the gospel in Marshpee, without any let, hindrance or molestation : That this instrument was made without any authority in the parties signing it, who were but two of the tenants in common with the other proprietors : That said instrument remained in the possession of Gideon Hawley and Simon Fish, two white men, until November 10th 1800, when it was recorded : That no use was made or occupation had of said lot, except as common land, till June 19th 1809, when the General Court passed a resolve purporting to confirm and render valid, to all the intents and purposes in said instrument expressed, the grant and allotment of land therein described, formerly made by the Indians, for the support of the gospel ministry among them : That in 1811, Phinehas Fish, the defendant, was sent to Marshpee, as a missionary, by the overseers of Harvard College, as trustees of a fund placed in their hands, by the will of John Williams of London, in 1711, to be dedicated to the "work of converting the poor Indians" : That said trustees of said fund agreed with the defendant to pay him \$520 per annum, from said fund, "it having appeared that he was acceptable and useful as a missionary" : That the proprietors of Marshpee never assented, in any way, to the settlement of the defendant among them, nor had any voice in the matter : But that the defendant took possession of the meetinghouse, which was built (by the English Society for propagating the Gospel among the Indians) for the use of Marshpee, and also of the 400 acre lot, known as "the parsonage," and of said Santuet Field and Great Neck, and has continued to use the same, to the exclusion of any use by the proprietors of Marshpee, except their use of said meetinghouse for the purpose of holding legal district meetings, as given to them by the aforesaid St. of 1834, c. 166 — the defendant claiming the use of said Santuet Field and Daniel's Island, by virtue of St. 1813, c. 44, (which was passed without the consent of Marshpee,) appropriating those lands as a parsonage for the use of the missionary on the plantation of Marshpee.

The bill then alleged that after the passing of St. 1834, c. 166, the civil rights of said proprietors were restored, and that their former guardians had no further control of them or of their

property, and that they had full power and right in equity, if not in law, to exercise the privileges of religious freedom, and the choice of their religious teachers, secured by the constitution of the Commonwealth : That they, after repeatedly forbidding the defendant to use their property, and disclaiming all connexion with him, or assent to his first coming among them, discharged him from all services as a missionary or otherwise, and subsequently settled a missionary of their own choice, whose religious services are attended by forty seven families ; being more than two thirds of the families in said district. Yet that the defendant continued in possession of said parsonage lot, and had committed and continued to commit great strip and waste on said lot by cutting wood on the same, for sale, so that the entire lot would be shortly stripped and wasted, and be of no further value or use until a new growth should spring up — which would require a period of 20 or 30 years.

The bill — after further alleging that the defendant threatened and intended to cut wood, timber and hay from said Santuet Field and Daniel's Island, and to make use of said meeting-house, to the exclusion of the plaintiffs and those whom the plaintiffs represented — concluded with a prayer that the defendant might be restrained, by injunction, from cutting or removing any wood, timber or hay from said lots, or committing or permitting any spoil on or to said premises, or using the same or any part thereof.

The defendant set forth in his *answer*, that the appropriation of the 400 acre lot, in 1783, was made by the selectmen of Marshpee, viz. Lot Nye, Matthias Amos and Moses Pognit, (named in the plaintiffs' bill,) together with Issac Halfday, Joseph Amos and Ebenezer Dives, some of the chief Indians of Marshpee, as he supposed they had a right to do ; and that the same was confirmed by the resolve of the General Court, mentioned in the bill, to "be and remain forever as a parsonage for the use and benefit of a congregational gospel minister" : That the defendant in 1809 was employed, by the corporation of Harvard College, to preach to the Indians at the plantation of Marshpee, reside among them, and perform parochial duties,

which services he performed for about 18 months, and in September 1811 was ordained as a congregational gospel minister and missionary over said Indians, by an ecclesiastical council convened by letters missive from the president and corporation of said college : That the overseers of Marshpee concurred with said corporation in said ordination and settlement of the defendant, and that the majority of said Indians assented thereto, and attended thereat : That he believed he was duly and regularly settled as such minister and missionary and by virtue of a written contract with the overseers of Marshpee, wherein it was stipulated that the defendant should "have and receive the improvement of the woodland already established and appropriated to the use of the ministry, and yearly and every year, during the continuance of his pastoral relation to said plantation," should "take therefrom so much wood as" should "be equal to the annual growth thereof," &c., and that the defendant should "occupy and improve so much meadow and pasture land as" should "be necessary to keep through the year one horse and two cows, during the continuance of his ministry as aforesaid," &c. : That the defendant, after his said ordination, took and has ever since kept possession of said 400 acre lot of woodland, and had, from time to time, taken wood therefrom, pursuant to said contract : That said Santuet Field and Daniel's Island were assigned to the defendant, in pursuance of said contract, for the purpose of keeping a horse and two cows, which assignment was confirmed by the General Court, by *St.* 1813, *c.* 44 ; and that he had, (rightfully, as he believed,) taken and kept possession of said assigned lands, as a parsonage : That the defendant had continued to minister as missionary at Marshpee, to the time of his said answer, and that he believed his pastoral relation had never been dissolved, but that his rights, as congregational minister and missionary there, still remained : That he believed he had not taken from said 400 acre lot more than the annual growth of the wood thereon, during the time of his possession thereof, and had not committed any strip or waste : That he had used said meetinghouse only for the purpose of religious service, (as he supposed he rightfully might,) in which

all the proprietors of Marshpee might have attended, if they had desired so to do: That he had never threatened, and did not intend, to commit any waste on said parsonage lot, nor to use the meetinghouse in any way except for free public worship, at which all the inhabitants of Marshpee may attend.

The defendant annexed to his answer a statement and schedule, as far as he was able, (as he averred,) of the amount and price of the wood and timber taken by him from said parsonage, during the time he had occupied the same.

The plaintiffs filed an *amendment of their bill*, "to meet the case made by the defendant" in his answer, in which they denied that the overseers of Marshpee had any power to make such a contract with the defendant, as is by him set forth, or that they could confer on him any right to use their land, or other property, as a parsonage; and in support of this their denial, they referred to the acts of the General Court establishing said overseers.

The plaintiffs also denied the authority of said overseers to contract with the defendant for his services as a missionary, or otherwise, beyond the period when the Marshpee Indians were reinstated in their civil rights by the aforesaid *St.* of 1834, c. 166.

The plaintiffs further denied the defendant's right to occupy said lands under his alleged contract with said overseers, because that contract purported to have been made only "during the continuance of his" (the defendant's) "pastoral relation," which, if it ever existed under said contract, had been discontinued in law, "by the abolition of said overseers, and the termination of all legal power in them to make or continue a contract binding on the district of Marshpee, or its property, for any future services to be rendered."

The plaintiffs furthermore denied that any parish or religious society of the proprietors of Marshpee existed, in said Marshpee, having power to settle a minister or manage parsonage property, until the passing of *St.* 1840, c. 65, which invested said district with all the powers and privileges of other parishes and religious societies, in regard to the public meetinghouse and parsonage lands belonging to said district.

The defendant, in his *answer to the amendment* of the plaintiffs' bill, affirmed that the said overseers had full authority, as he supposed, to make the aforesaid contract with him, and that the rights which thereby vested in him were not impaired by the termination of said overseers' powers by *St. 1834, c. 166*; that his relation, as minister and missionary, was not affected by said statute; that said relation had been recognized, impliedly or expressly, by all the legislative acts passed since the defendant's ordination—particularly by *St. 1813, c. 44*, referred to in his first answer: That prior to the passing of *St. 1840, c. 65*—although there was no parish or religious society in Marshpee, with power to settle a minister, &c.—the General Court, the Indians of Marshpee, and the overseers of Marshpee, either jointly or severally, had power to settle a congregational minister and missionary over said Indians, and manage parsonage property in said plantation, and that by the acts of the General Court, the consent and desire of said Indians, and the contract and consent of said overseers, (as before set forth,) either jointly or severally, the defendant was legally contracted with, and legally instituted into the office of congregational minister and missionary, and thereby had, and continued to have, a right to use and improve all the parsonage lands of said Marshpee: That by said act of 1840, c. 65, it was provided that nothing therein contained should in any way affect or impair the defendant's rights to enjoy the parsonage or other lands improved by him in said district, or any other ministerial rights which he by law had.

Hallett, for the plaintiffs.

Marston & Scudder, for the defendant.*

WILDE, J. We have considered this case with great attention, and with a strong inclination to come to such a decision as might determine, if we could, the conflicting claims of the contending parties. Such a decision, by preventing all further

* The following statutes, &c., besides those above referred to, were cited at the argument: *Anc. Chart. 14. 32. 33. 132. 133.* *Plymouth Colony Laws, 74. 141. 172. 239.* *Sts. 6 William & Mary, c. 1: 13 William III. c. 21: 4 Geo. I c. 11. 12 Geo. I. c. 7. Sts. 1788, c. 2: 1818, c. 105: 1842, c. 72.*

litigation and expense, would undoubtedly be beneficial to both parties. But upon a full consideration of the case, as stated in the bill, we are of opinion that it is not within the equity jurisdiction of the court.

The bill alleges that the plaintiffs, with others, are the lawful proprietors of the lands described in the bill ; and the charge is, that the defendant has unlawfully committed great strip and waste on the premises, by cutting and carrying away valuable wood, timber and grass, thereon standing and growing ; and that he threatens and intends to continue to commit farther strip and waste in and upon the premises, without any lawful right and title therein or thereto : That although he claims a right of possession of the premises, as a settled missionary or minister of the District of Marshpee, the same being lands set apart as a parsonage ; yet that in truth he has no such right of possession, and that if he ever had been lawfully settled as such missionary or minister, (which the plaintiffs deny,) he nevertheless had been lawfully dismissed by the plaintiffs from his said office and trust, long before the filing of this bill. And the plaintiffs' counsel contends that the case, thus stated, is within the equity jurisdiction of this court concerning waste. Rev. Sts. c. 81, § 8

At common law, a prohibition from the court of chancery, which was considered as the foundation of a suit to restrain or punish the commission of waste, lay only against tenant in dower, tenant by the curtesy, and guardian in chivalry ; but it was extended by the statute of Gloucester, 6 Ed. I. c. 5, and other statutes, to tenants for life and tenants for a term of years. 22 Vin. Ab. Waste, S. 2 Story on Eq. § 909. Eden on Injunctions, 144. Waste, voluntary and permissive, is defined by Lord Coke to be spoil or destruction in houses, gardens, trees, and other corporeal hereditaments, to the disherison of him that hath the remainder in fee. Co. Lit. 53 a. But courts of equity have interposed in many cases where the party is punishable at law for committing waste : As where there is a tenant for life, remainder for life, remainder in fee ; the first remainder man for life will be restrained from committing waste, though no action would lie against him, at common law, for the

commission of waste, because the next remainder man had not the inheritance ; and the remainder man in fee could not maintain an action of waste, at common law, because he had not the immediate remainder. 2 Story on Eq. § 913. And so in many other cases, courts of equity have interposed to restrain acts which are deemed equitable waste, from their manifest injury to the inheritance, although not inconsistent with the legal rights of the party committing those acts, or threatening to commit them. 3 Wooddeson, 399-404. 2 Story on Eq. §§ 914, 915. But the interposition of courts of equity was always confined to cases founded on privity of title, until Lord Thurlow, with much hesitation, granted a writ of injunction against a mere trespasser, who opened a coal mine on his own close, and took coals from the adjoining close belonging to the plaintiff—on the ground that irreparable mischief would be the consequence, if the trespasser were allowed to proceed. And in *Mitchell v. Dors*, 6 Ves. 147, Lord Eldon granted a writ of injunction against a trespasser, on the authority of the case before Lord Thurlow. But in *Smith v. Collyer*, 8 Ves. 89, Lord Eldon refused an injunction against cutting timber, where the title was disputed. He says, “I do not recollect any instance of this sort. The defendant denies that the plaintiffs are devisees” of the *locus in quo*. “It is not waste but trespass, upon their own showing. There was no instance of an injunction in trespass, till the case before Lord Thurlow upon a mine, which, though trespass, was very near waste. In that case, the first instance of granting an injunction in trespass, there was no dispute whatsoever about the right. Here the right is disputed.” According to this case, it seems clear that a court of chancery, having full equity jurisdiction, would not sustain the present bill. The bill charges a trespass, and the defendant denies the plaintiff’s title. The main question is one of title, and should be decided in an action at law ; and nothing is alleged in the bill which shows that the plaintiffs have not an adequate remedy at law.

In *Norway v. Rowe*, 19 Ves. 146, Lord Eldon says, “the application, in the case of waste, depends upon privity of title

acknowledged by the answer. The court has certainly proceeded to extend injunctions to trespass ; but I do not recollect it ever granted on that head, where the fact of the plaintiff's title to the property, on which waste was committed, was disputed by the answer." In *Livingston v. Livingston*, 6 Johns. Ch. 500, 501, Chancellor Kent remarks, that "it is not the general rule, that an injunction will lie in a naked case of trespass, where there is no privity of title and where there is a legal remedy for the intrusion. There must be something particular in the case, so as to bring the injury under the head of quieting possession, or to make out a case of irreparable mischief, or where the value of the inheritance is put in jeopardy." But whatever might be the decision of a court having full equity powers, on this point, we are very clear that this court has no jurisdiction in equity in the present case.

By the Rev. Sts. c. 81, § 8, the court has power to hear and determine in equity all suits concerning waste and nuisance ; and by c. 105, sundry provisions are made respecting waste and trespass on real estate, giving remedies by action at law, and in suits in equity, in sundry cases. By the first section of c. 105, it is provided that "if any tenant in dower, tenant by the curtesy, or tenant for term of life or years, shall commit or suffer any waste on the premises, the person, having the next immediate estate of inheritance therein, may have an action of waste against such tenant, wherein he shall recover the place wasted, and the amount of the damage done to the premises." The 2d section provides for a like action in favor of an heir, for waste done in the time of his ancestor, as well as in his own time. By several subsequent sections, tenants in common, coparceners and joint tenants are made liable to a penalty for any strip or waste done to the common property, to be recovered in an action of trespass. So if a tenant, during the pendency of any action for the recovery of lands, shall make any strip or waste thereon, he is liable to pay threefold damages, to be recovered in an action of trespass. And the like penalty is incurred by any wilful trespass committed on the land of another person without license therefor. Then follows the 14th section, by

which provision is made, "that the supreme judicial court may hear and determine in equity all matters concerning waste, in which there is not a plain, adequate and complete remedy at law."

The question is, whether this section can, by any reasonable construction, be extended to cases of trespass, as well as to those of waste; and we are of opinion that it cannot. The uniform rule of construction of the various statutes conferring chancery jurisdiction on this court has been, never to take cognizance of any subjects which are not expressly brought within it by statute; and not to extend our jurisdiction to such subjects by implication; and certainly not when the implication is doubtful. Now if the legislature had intended to extend the equity jurisdiction of the court to cases of trespass, as well as to those of waste, it would have been so expressed. The learned commissioners, who framed the revised statutes, must, we think, have had in mind the technical distinction between waste and trespass, and the inference is, that the 14th section was not intended to embrace cases of trespass. But if no such inference could be made, we think it very clear that this section cannot be extended so as to include any trespass not mentioned in the statute; and this is not such a trespass. The 11th section provides, that "if upon the trial of such an action," (trespass) "it shall appear that the defendant had good reason to believe that the land on which the trespass was committed was his own, or that he was otherwise lawfully authorized to do the acts complained of, he shall be liable only for the single damages assessed therefor." Now supposing that the trespass complained of in this suit may be proved to be such a trespass, still we have no jurisdiction in equity; for the provision refers clearly to a trial in an action at law wherein the plaintiff demands three-fold damages; and that is an adequate and an appropriate remedy.

Another ground on which the plaintiffs rely is, that here are or may be "more than two parties, having distinct rights or interests, which cannot be justly and definitively decided and adjusted in one action at the common law." Rev. Sts. c. 81, § 6.

Raymond v. Nye & another.

But this clearly is not such a case. If the plaintiffs are proprietors of the *locus*, they alone are entitled to damages ; or if the *locus* is the property of the district of Marshpee, then the district alone is entitled to sue ; so that in either case the remedy at law is the proper remedy.

Bill dismissed

JOEL RAYMOND vs. DAVID NYE & another.

A plaintiff, who calls for the defendant's books at the trial, and upon their being produced claims the benefit of entries made therein to his credit, thereby makes the books *prima facie* evidence only, and may therefore contest and disprove the charges therein made against him by the defendant.

It is to be presumed that jurors understand the instructions of the court in matters of law ; and where proper instructions are given to them, a new trial will not be granted on the suggestion that they did not rightly understand the instructions

THE chief justice, before whom this cause was tried, made the following report thereof :

In this case, which was *assumpsit*, and in which there were mutual accounts, an auditor had been appointed, who had reported a balance due to the defendants. In order to show that the report of the auditor was not right, the counsel for the plaintiff called for the books of the defendants containing their account with the plaintiff ; and on their being produced, he claimed the benefit of an entry therein, to his credit, of a large amount of iron as received of him by the defendants, and relied upon it as tending to show that the report of the auditor should have given him the benefit of it, and that the jury ought so to do. The counsel for the defendants contended that the account of the defendants ought to be taken all together, and that credit ought not to be collected from the books to charge them, without admitting the debit therein also charged. But the jury were instructed, that the plaintiff, by calling for the defendants' books and claiming the benefit of said credit, had made the books *prima facie* evidence only, and that it was open to him to contend, upon the whole evidence, that the items on the debit side of said account were not proved, or were not proper subjects of

charge in the account, and to show that he ought not to be concluded thereby.

There was evidence tending to show that the plaintiff's account was for blacksmith's work done principally for a ship which the defendants were building ; that there was no special agreement respecting the work ; that the plaintiff relied on a *quantum meruit* ; also that some of the claims and charges of the defendants, as contained in their books, were for money paid to other persons for doing part of the smith's work for said ship. In reference to this evidence, the jury were further instructed, that if there was no contract by the plaintiff with the defendants to do the whole of the smith's work for said ship, or any specific part thereof, or to do it within any limited time, the defendants could not sustain their claim for damages, either for money paid to other persons for doing part of the work, or for delay and detention in the work which the plaintiff did ; although such items of damage were charged in the defendants' books, on which the plaintiff claimed credits.

The jury returned a verdict for the plaintiff.

New trial to be granted, if said instruction was not right ; otherwise, judgment to be rendered on the verdict.

Eddy & S. Miller, for the defendants, contended that where one party claims an item of credit entered in the other's books, he cannot reject the items of debit ; but if he calls for the books, he must take them as they are, with the balance as it is therein stated. 1 Saund. Pl. & Ev. 46. *Randle v. Blackburn*, 5 Taunt. 245. *Waggoner v. Gray*, 2 Hen. & Munf. 603. *Harrington v. Hall*, 2 Aik. 175. *King v. Maddux*, 7 Har. & J. 467. They also insisted that the instructions given by the judge were misunderstood by the jury, and were so expressed as to lead the jury to misapprehend them.

Hallett, for the plaintiff. The cases cited by the defendants only decide that where parties have *settled* an account, neither of them can deny the balance, unless a mistake is shown ; or that in an open account, all the entries, both of debt and credit, in one party's books, must *go to the jury*, when the other party relies on an entry therein to his credit. In the latter case, the

jury are not bound to allow both debt and credit, as found on the books, unless they find the entries were correctly made. 1 U. S. Digest, Accounts, 199.

The court would not receive the jurors' affidavits that they misapprehended the instructions of the judge. *Tyler v. Stevens*, 4 N. Hamp. 116. *A fortiori*, the court will not presume that the instructions were not understood by the jury.

DEWEY, J. We understand the instructions to the jury to have been, that the account books of the defendants, though introduced as evidence in the case by the plaintiff, were to be considered *prima facie* evidence only, of all charges therein appearing to have been made against the plaintiff, and that it was open to him to control this evidence by other testimony; and if upon the whole evidence the jury were satisfied that the charges on the books were not properly made, and did not constitute a valid demand against the plaintiff, they might be rejected.

This we think was the correct rule, and has given to the evidence resulting from the books all the effect it was entitled to. Treating the evidence as admissions by the plaintiff, it was open to explanation, and liable to be controlled by other evidence. Considering it in the nature of an account stated by the parties, it would still be competent for either party to show errors or mistakes. Taking it in any proper view, it could only be *prima facie* evidence, and not such as should estop the other party from explaining and controlling it.

The same rule applies, and the same answer is to be given, to the objection to the ruling of the court upon the conclusiveness of the charges against the plaintiff, upon the books of the defendants, for money paid to other persons for part of the work upon the ship which the defendants were building, and upon which the plaintiff had labored. It was competent for the plaintiff to show that these charges were wholly unauthorized and illegal, although made upon the books which he introduced.

The counsel for the defendants suggested a strong belief that the jury misunderstood the charge of the presiding judge, and were misled through their misapprehension of it. The only

possible ground for supposing the instructions liable to misapprehension arises from the use of these words : " It was open to the defendant to contend, upon the whole evidence, that the items on the debit side of the account were not proved, or were not proper subjects of charge." It is said that the jury might have understood that this ruling required the defendants to prove the correctness of the charges on their books against the plaintiff, and not that the burden was shifted upon the plaintiff to disprove them, after he had made a *primâ facie* case against himself, as to those charges, by introducing the books as evidence. But it is to be borne in mind that this ruling was preceded by the declaration that the plaintiff, by calling for the books and introducing them, had made them *primâ facie* evidence, though not conclusive. The position assumed by the defendants at the trial before the jury was, that the charges against the plaintiff, contained in the books, must be allowed by the jury ; and the only point in dispute seems to have been, whether greater weight should be attached to this evidence than to consider it *primâ facie* evidence. If treated as evidence of this character, it still would avail the defendant, and required no further evidence from him, until it was disproved by the plaintiff.

Objections of this nature are to be received with great caution. The theory of trial by jury presupposes that those who are called to act as jurors will possess sufficient intelligence to understand, so far as is necessary for the proper performance of their duty, the exposition of the rules of law as given by the court : And if the proper legal instructions are given, expressed in appropriate language, it must be assumed that the jury were legally instructed and that they understood those instructions. Hence all attempts to introduce the testimony of jurors, after the verdict has been returned and recorded, to show that they misunderstood the charge of the judge, have, I believe, been unsuccessful, and have received no sanction from the court. The appropriate remedy, when the counsel seriously apprehend that the charge may be misunderstood, or is not sufficiently direct and explicit in matter of law, is to suggest the

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same before the case is committed to the jury. *Lathrop v. Inhabitants of Sharon*, 12 Pick. 172. A further remedy for cases where it is obvious to the presiding judge, from the verdict returned, that the jury must have misunderstood or misapplied the rules of law as stated from the bench, may also be found in an application to the court for a new trial on the ground that the verdict is against the evidence, under the instructions given to the jury.

We do not perceive, in the present case, any sufficient reason for granting a new trial.

Judgment on the verdict.

CHRISTIAN SOCIETY IN PLYMOUTH vs. ELIJAH MACOMBER
& another.

Where persons, in the year 1824, formed themselves into an association for religious purposes, without any lay organization under *St.* 1823, c. 106, or otherwise, but solely under the advice and direction of the ministers and elders of their denomination, and entered into an agreement, which they afterwards fulfilled, to support and maintain public worship, it was held, that they constituted a religious society under *St.* 1811, c. 6, and became competent, as such, to take grants or donations, and to prosecute an action of trespass to maintain and defend the possession of real estate granted or leased to them for their use as a religious society. Held also, that the members of such society were competent witnesses for the plaintiffs in such action, within the intent of the *Rev. Sts.* c. 94, § 54.

THIS was an action of trespass *quare clausum fregit*, in which the plaintiffs complained that the defendants broke their close, entered their meetinghouse, took possession thereof, and excluded the plaintiffs therefrom for a long time, viz., from the 1st of April 1839, to the time of the commencement of the action on the 24th of March 1840. The defendants pleaded the general issue, and gave notice that they should deny the capacity of the plaintiffs, as a corporation or aggregate body, to bring this action, and should also deny the plaintiffs' seizin and possession of the *locus in quo*; that they should prove soil and freehold in Elijah Macomber, one of the defendants, and that the other defendant entered by license from him.

The chief justice, who tried the case, ruled that under this

plea and notice, the plaintiffs were bound to prove their right and capacity to sue as a corporation. [See 3 Met. 235. 417.]

No evidence was offered that the plaintiffs had been incorporated by an act of the legislature, or that they had organized themselves conformably to the provisions of *St.* 1823, c. 106, or that they had applied to a justice of the peace for a warrant to call a meeting, or that they had otherwise complied with the provisions of that statute. But they contended that they were a legally constituted unincorporated religious society, and, as such, had power, under *St.* 1811, c. 6, § 3, to take grants and donations, in their aggregate capacity, and in the same capacity to maintain an action of trespass to secure and defend their right of possession of an estate granted to them.

Several witnesses were called by the plaintiffs, who were members of said society, and were objected to by the defendants, as incompetent by reason of interest ; but the objection was overruled, and they were permitted to testify. Evidence was then offered by the plaintiffs to show the formation of a church and society, conformably to the rules and usages of the denomination called Christians ; that for this purpose several elders and preachers of that denomination, from other places, by invitation of this society, attended them, and that they met together in the year 1824 ; that the names of the persons associating were entered in a book, kept by one of the members, as scribe ; that they entered into an agreement to go on and maintain public worship, observe religious ordinances, and watch over each other ; that they were called upon to take each other by the hand, in token of christian fellowship ; that they received the right hand of fellowship from the ministers present ; and that prayers and addresses were made by the ministers on that occasion. The evidence further tended to show that they had no other organization ; that since 1824 they have had annual and other meetings for business ; had maintained public worship, with more or less constancy ; had usually chosen some one of their number to be clerk and keep a record or memorandum of their votes ; but that such clerk had never been sworn.

The defendants contended that though the evidence might

prove the constitution of a church or ecclesiastical body, it had no tendency to prove the constitution of a religious society with power to take grants, and bring actions, as an unincorporated religious society, within the aforesaid St. of 1811, and that a deed to such church would give no title to them as a society.

But the jury were instructed, that if the plaintiffs met together, under the advice and direction of ministers and elders of the Christian denomination, and formed themselves into an association for religious purposes, and agreed, among other things, to support and maintain public worship — though without any lay organization, by an application to a justice of the peace or otherwise, they constituted a religious society under St. 1811, c. 6. and became competent, as a body, to take a deed or lease of real estate: That such a deed or lease would constitute a grant or donation, and give them a right and power, under that statute, to prosecute an action of trespass *quare clausum fregit* to maintain and defend their possession of estate thus leased or granted for their use as such religious society. To this instruction the defendants excepted.

The plaintiffs relied on a deed, and also upon a lease for years or at will, alleged to have been made by Elijah Macomber, one of the defendants, to the society, by the name under which they associated. The question of the execution of such deed or lease was left to the jury under instructions not excepted to.

A verdict was returned for the plaintiffs.

New trial to be granted, if the instruction excepted to was wrong, or if the members of said society ought not to have been admitted as witnesses for the plaintiffs.

Eddy, for the defendants.

W. Thomas & Coffin, for the plaintiffs.

HUBBARD, J. Two questions are presented for the consideration of the court in this case. The one, whether the plaintiffs constituted a religious society capable of receiving and holding, as such, a grant or donation of real estate; the other, whether the witnesses, who are members of the society, were legally competent to testify on behalf of the plaintiffs.

In respect to the first question, it is urged upon the consideration.

ation of the court that this was merely an ecclesiastical organization of the plaintiffs as members of a church, and not a legally organized religious society created by force of any statute of the Commonwealth, and as such capable of taking and holding real estate. But while such a distinction is advanced, the difference between an ecclesiastical and a lay organization of an *unincorporated* religious society is not pointed out. Where a society is incorporated by any of the express modes provided in the statutes, a lay organization is well ascertained, and the manner of proceeding prescribed ; while the ecclesiastical regulations are left to be settled by the forms and usages of each denomination, about which the statutes neither direct nor interfere. But in the case of an unincorporated society, whose civil existence is acknowledged for certain important purposes, nothing else is required but an adherence to its own forms and usages, whatever they may be, if not contrary to the constitution and laws of the Commonwealth. And whether a difference is made, or not, among themselves, in those forms and usages which involve the distinction of lay and ecclesiastical, is of no importance when they seek, as an unincorporated society, to pursue or protect their civil rights. And the court will not be astute to establish distinctions which they believe the legislature did not intend to make.

It is not contended by the plaintiffs, that they associated under an act of incorporation, or were regularly organized by pursuing the requisitions of *St. 1823, c. 106* ; but that they are a religious society, within the provisions of *St. 1811, c. 6*, sometimes called the religious freedom act. It having been expressly decided in *Oakes v. Hill*, 10 Pick. 333, that the *St. of 1811* was not repealed by the *St. of 1823*, (which decision was confirmed by the case of *Fisher v. Whitman*, 13 Pick. 350,) it is only necessary to examine whether the plaintiffs bring themselves within the provisions of that statute, to enable them to take and hold real estate as an unincorporated religious society. That statute was intended to place societies of every denomination of christians equally under the same protection of the law, whether corporate or unincorporate ; and it provided, in substance, that

every association of citizens for the support of public worship, united together according to the forms and usages of their own religious sect or denomination, should not only be entitled to appropriate the moneys assessed upon and paid by them for the support of their own teacher, but it further provided, that in case any donation, gift or grant should thereafter be made to any unincorporate religious society, such society should have full power to manage, improve and use the same, according to the terms and conditions on which the same might be made, to elect suitable trustees, agents or officers therefor, and to prosecute and sue for any right which might vest in such society in consequence of such donation, gift or grant.

It appears by the evidence, as reported in this case, that the plaintiffs contend that in the year 1824, a church and religious society was formed conformably to the rules and usages of the denomination called Christians ; and they produced witnesses to prove that for this object they, and their former associates, invited the elders and preachers of their denomination, from other places, to meet them for the purpose of organizing their society ; that a meeting was accordingly held, the names of the persons associating were entered in a book kept by one of the number as a scribe ; that they entered into an agreement with each other to maintain public worship, to observe religious ordinances, and to watch over each other ; that they were received into the fellowship of the churches of that denomination, and have since that time maintained public worship with more or less constancy ; have held annual and other meetings for the transaction of their business, and have usually chosen one of their number to be clerk and to keep a record or memorandum of their votes, though such clerk has never been sworn.

It is true that the society never organized under the statute of 1823, nor since that time under the provisions of the revised statutes ; but we cannot doubt, that being a society organized and established according to the forms and usages of their own sect and denomination, they became not merely a church or ecclesiastical body, but an unincorporated religious society, within the intent and meaning of *St.* 1811, c. 6, and, as such, were

made capable of taking and holding, either by deed or demise, the real estate, for a trespass on which the present action is brought. Without such a construction, the plaintiffs, though a religious society associated for public religious worship, and regularly maintaining the same, are deprived of the very advantages intended to be bestowed upon unincorporated religious societies by the statute of 1811 ; which act was not repealed by any subsequent legislation on the same subject, prior to the revision of the statutes. Nor do the revised statutes themselves deprive the plaintiffs of any rights, or take away any remedies, which they could have previously exercised ; for by Rev. Sts. c. 20, § 25, it is provided that “in case any donation, gift or grant, shall be made to any unincorporated religious society, such society shall have the like power to manage, use and employ the same, according to the terms and conditions on which the same may be made, as incorporated societies now have, or may hereafter have by law ; to elect suitable trustees, agents or officers therefor ; and to prosecute and sue for any right, which may vest in them, in consequence of such donation, gift or grant ; *and such society shall be a corporation*, so far as may be necessary for the purposes expressed in this section.” And while the three subsequent sections provide an easy method for any religious society, not incorporated, to organize themselves into a corporation, it does not compel such organization in order to enable an unincorporated society to avail itself of the privilege of any donation, gift or grant ; but on the other hand, the 25th section is a reënactment of the 3d section of the law of 1811, with the additional provision, that for the purpose therein named, every such society is declared to be a corporation ; the object of which clause seems expressly to be to remove the objection of their being a mere collection of individuals without any legal organization.

We are therefore of opinion that the plaintiffs are an unincorporated religious society, within the intent and meaning of the act of 1811, and, as such, capable of taking and holding any gift, grant or donation of real estate, and consequently of prosecuting actions for the maintenance of the rights growing out of the same.

We are now brought to the consideration of the second question, viz., whether the persons who were members of the society, and permitted to testify in the cause, were competent witnesses ; and we think this question is dependent upon the first. It was indeed said by the learned counsel, in arguing this point, that the incompetency of witnesses, in cases analogous to the present, has been twice ruled at nisi prius ; but we are not favored with the names of the cases, nor the circumstances connected with the rulings. We must therefore decide this point independently of the rulings referred to, whatever they may have been ; and being of opinion that the plaintiffs, called the First Christian Society in Plymouth, are an unincorporate religious society embraced within the provisions of the act of 1811, we think they are also entitled to the privileges of the 54th section of the 94th chapter of the 'revised statutes, which provides, among other things, that in all cases in which a legally organized religious society "shall be, in their corporate capacity, parties to, or interested in, any suit, any member of such corporation may be admitted as a competent witness to testify, provided there be no sufficient objection to his competency, except that of his being such member of the corporation." Now in this case, the plaintiffs, being associated together under their own forms and usages, for public religious worship and maintaining the same, are in our opinion, by virtue thereof, a legally organized religious society, and, as such, constitute a corporation, so far as may be necessary to enable them to prosecute and sue for any right which may vest in consequence of any donation, gift, or grant to them. Its members, therefore, may be witnesses in cases like the present, by force of the statute, which is considered as beneficial and remedial, and has already been extended to religious societies of another State suing within this Commonwealth. *First Baptist Church in Bristol v. Slade*, 23 Pick. 160.

Judgment on the verdict

JOHN HUMPHREY vs. JOSIAH KINGMAN & others.

Payment of a state or county tax, within two years next preceding the election of governor, &c., by one who is in other respects a qualified voter, entitles him to vote at such election, although such tax was illegally assessed upon him.

Though a tax, which is assessed upon one person, is paid for him by another, without his previous authority, yet if he recognizes the act, and repays or promises to repay the amount, on the ground that such person acted as his agent, he thereby acquires the same right to vote as if he had paid the tax with his own hand.

Where A., who was taxed for land, denied, when called on for payment, that he was rightfully taxed, and directed the collector to call on B., the owner of the land, and the collector thereupon called on B.'s wife, in the absence of B., and she paid the tax, and A. afterwards repaid her and took the receipt which the collector had given her; it was *held*, that if A. directed the collector to call on B. because the tax was wrongfully assessed on A., and if the wife of B. paid the tax, believing that B. ought to pay it, and if A. afterwards, not believing himself to be rightfully assessed, or that B. had any claim on him for the amount, repaid the amount merely for the purpose of securing a right to vote, it was not such a payment as entitled him to vote. *Held* also, that in an action by A. against selectmen for refusing his vote, they might show that A. did not occupy the land for which he was taxed, as that fact had a bearing on the question whether the wife of B., in paying the tax, acted as A.'s agent, and whether she called on A. for repayment.

A voter, who is challenged at the polls, cannot maintain an action against selectmen for refusing to receive his vote, if they do not act wilfully or maliciously, but under a mistake into which they are led by his conduct which was likely to mislead them into a belief that he had abandoned his claim to a right to vote.

Selectmen have authority, even after the opening of a town meeting, to strike from the list of voters the name of a person who is not a legal voter.

TRESPASS upon the case against the selectmen of North Bridgewater for refusing the plaintiff's vote at the annual election of governor, &c. in November 1840. The trial was in the court of common pleas, before *Warren, J.*; and the principal question was, whether the plaintiff had paid any state or county tax assessed upon him within two years next preceding that election.

It appeared that in 1837, 1838 and 1839, a county tax had been assessed upon the plaintiff, in the town of Easton, because of his supposed interest in a small lot of land in that town; that said land belonged to Benjamin G. Green, a brother in law of the plaintiff; that the collector of taxes for said town called upon the plaintiff, in March 1840, for payment of said taxes, and that the plaintiff refused to pay them, (saying that it did not belong to him to pay them, as he did not own the land,) and

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directed the collector to call on said Green ; that the collector called on said Green's wife, sister of the plaintiff—said Green being then absent at sea—and told her what the plaintiff had said ; that she thereupon paid the amount of said taxes, and that the collector gave a receipt therefor, as follows :

. Mr. John Humphrey's tax in Easton for 1837	\$ 0-66
“ “ “ for 1838	\$ 0-43
“ “ “ for 1839	\$ 0-30
	\$ 1-08

Easton, March 26, 184 . Recd. Payment of ———

Tisdale Harlow — Collector of Easton.

It also appeared that said collector had previously called on the plaintiff for the tax of 1837, and that he had promised to pay it.

There was no evidence of any previous request made by the plaintiff to Green, or his wife, to pay the amount of these taxes for him ; but there was evidence tending to show, that after such payment and before the day of said election, Mrs. Green informed the plaintiff that she had paid said taxes, and that he repaid the amount to her.

It appeared that on the Saturday before the day of said election, the plaintiff presented the collector's receipt to the defendants, who thereupon adjourned the consideration of the subject until the day of election ; that after the polls were opened on that day, the plaintiff tendered his vote to the defendants, who presided at the meeting, and that they thereupon added his name to the list of voters ; that a citizen of the town challenged the plaintiff's right to vote, and the defendants then inquired of the plaintiff if he paid the taxes aforesaid ; that the plaintiff replied that he did pay them ; that he was asked if he would make oath to that fact, to which he replied that he would ; that the said Green then declared that he, (Green,) or his wife, had paid them ; that the plaintiff made no statement or explanation to the defendants of the circumstances attending said payment, but immediately withdrew, without further urging his rights ; and that the defendants then directed the town clerk to strike the plaintiff's name from the voting list.

The testimony of Green and his wife was introduced the

plaintiff, without objection by the defendants ; but they subsequently introduced evidence of the declarations of the plaintiff, tending to show Green's pecuniary interest in the result of the suit. And the judge instructed the jury, that if they were satisfied, from the evidence, that Green had a pecuniary interest in the result of the suit, they should exclude from their consideration his testimony and that of his wife.

The defendants offered to prove that the plaintiff did not occupy or improve the land upon which the taxes were assessed, and the evidence was admitted, although the plaintiff objected thereto. But the judge instructed the jury that it was immaterial whether the plaintiff was rightfully assessed, or not ; still that the evidence was proper for their consideration, as bearing upon the question whether Mrs. Green, in paying the taxes, acted as agent for the plaintiff, and whether she ever called upon him for repayment.

The jury were also instructed, that though the defendants had inserted the plaintiff's name on the voting list, they had a right, after the polls were opened, and after the plaintiff claimed a right to vote, to strike his name from the list, if he was not a qualified voter.

The other instructions to the jury are hereinafter set forth at large in the opinion of the court.

The jury returned a verdict for the defendants, and the plaintiff alleged exceptions to the rulings and instructions of the judge.

Hallett, for the plaintiff.

W. Baylies, for the defendants.

HUBBARD, J. The two principal questions presented for consideration, under the instructions of the presiding judge in the court of common pleas, are, 1st. whether the tax, alleged to have been paid by the plaintiff, was paid under such circumstances as to entitle him to vote at the election in November 1840 ; and 2d. if it was so paid by the plaintiff, whether his conduct at the meeting was such as to mislead the defendants, and to exonerate them from all liability to damages in this action.

The right of voting and the burden of taxation are so connected, that with a few specified exceptions, the one may be said to be dependent on the other ; and to entitle a man to vote, he must, as a prerequisite, have paid, within two years next preceding the time of the election at which he claims a right to vote, a state or county tax, by himself or his parent, master or guardian ; by which last provision, minors who have been assessed for a poll tax, or whose property has been assessed for a state or county tax, and which tax has been paid, become immediately qualified to vote on their arriving at full age.

In the case at bar, the judge instructed the jury, "that if the taxes were paid by Mrs. Green *for the plaintiff*, with or without previous authority from him, and he recognized the act and repaid, or promised to repay her the amount, on the ground that she had acted as his agent, then the plaintiff stood precisely in the same situation as if he had made the payment to the collector with his own hands ;" and we think the instruction was correct. The object of the provision is, to obtain the payment of taxes ; and if payment is made in behalf of an individual, and he recognizes the obligation or liability to pay, it is equivalent in law to the payment by himself ; as the officers, who collect the taxes, are not called upon to trace the sources from whence the money comes, by which the taxes are paid. The judge also further instructed the jury, if they believed, upon the evidence offered to them, "that the plaintiff directed the collector to call upon said Green for payment, because the tax was wrongfully assessed upon the plaintiff, and if Mrs. Green paid the tax, supposing that it belonged to her husband to pay it ; and if the plaintiff afterwards, and before the election, not believing that the tax was rightfully assessed upon him, or that Green had any legal claim upon him for the amount, but merely for the purpose of securing a right to vote, repaid the amount to Mrs. Green, and she received it, for the purpose of conferring this right, it was not such a payment of the tax as entitled him to vote." And we are equally satisfied with the correctness of this instruction. For if the plaintiff did not own the land upon which the tax was assessed, but it belonged to his brother in law, Green

and his wife, in his absence, paid the tax for her husband ; then the tax was not paid by the plaintiff, but by him to whom it rightfully belonged to pay it. The tax itself was not paid twice, and the subsequent act of the plaintiff, in giving the same amount of money to Mrs. Green, and taking from her the collector's receipt of the payment of the tax, which on the face of the receipt was assessed to the plaintiff, was not a payment of a state or county tax either legally or illegally assessed upon him. It was the taking advantage of the mistake of the assessors in a neighboring town, as to the ownership of non-resident property, and by means thereof to represent himself as rightfully entitled to vote, under the pretence of having paid a tax within two years.

It is not the mere payment of money, that qualifies a man to become a voter, but the money paid must be for the discharge of a tax actually assessed upon him, whether legally or illegally. This is not the case of one man's paying the tax of another to enable the other to vote ; for this was not the tax of the plaintiff — if the jury believed the evidence — for he had disavowed it, and through his communication the true owner had paid it ; and he cannot make himself a legal voter, by giving money to the person who paid the tax, and to whom it belonged to pay, for the sake of getting the collector's receipt and thus enabling himself to furnish to the selectmen apparent evidence of having paid the tax himself. *Bridge v. Lincoln*, 14 Mass. 373.

The second important question arising in this case is, that the presiding judge further instructed the jury, "that if the plaintiff had a legal right to vote at the said election, and the defendants, not acting wilfully or maliciously, but through mistake, had rejected his vote, and if they were led into that mistake by the plaintiff, he was not entitled to a remedy against them ; that they should consider the evidence bearing upon this part of the case, and if they were satisfied that the plaintiff had, at the town meeting, pursued such a course of conduct as would be likely to mislead the defendants into the belief that he abandoned his claim to a right to vote, and if in fact the defendants were misled, their verdict should be for the defendants."

The principle involved in this instruction is one of impor-

tance, both as it regards the rights of voters and the protection which the law affords to officers in the discharge of their duty, who are made personally responsible for the manner in which they perform it. And the case of *Lincoln v. Hapgood*, 11 Mass. 350, is relied upon by the plaintiff in his argument, to show that the instruction was erroneous. But we think the case at bar is clearly distinguishable in principle from that. There no misrepresentation was made by the plaintiff, nor was there proof of any act or conduct of his, at the time of the election, which could mislead the selectmen, and thus expose them to error; but it was a mistaken judgment upon a knowledge of all the facts fully laid before them. But in the case at bar, the plaintiff, after his right to vote was challenged, (the selectmen having previously added his name to the list of voters,) on being inquired of, if he had paid the said taxes, replied that he did pay them, and on being asked if he would make oath to that fact, replied that he would. Yet when Green declared that he or his wife had paid them, the plaintiff made no statement or explanation to the defendants of the circumstances attending said payment, but immediately withdrew, without further urging his rights. In consequence of this, the defendants directed the town clerk to strike his name from the voting list. Upon this evidence, the presiding judge charged as before mentioned. Here, the conduct of the plaintiff misled the selectmen into the belief that he had abandoned his claim to a right to vote, and consequently that he had not paid the tax. And we are of opinion that the instructions were correct; because the error of judgment, if any, for which the defendants are now sought to be charged in damages, arose from the plaintiff's own conduct, and did not proceed from their mistaken view of his rights. And he shall not now be permitted to visit upon them the consequences of his own misjudgment. It is the sound application of the maxim that a man shall not take advantage of his own wrong; that he shall not lie by, when the time is passing in which it is his duty to present his claims, and forbear to urge them, and afterwards attempt to enforce his rights, to the injury of others. When the selectmen were inquiring into the facts.

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to enable them to make a correct decision, the plaintiff, instead of persevering in his claim and removing the objection raised, or showing that it was unfounded, abandoned his claim and so led them into error ; and he shall not now be permitted to set up that right, though it really existed, to the damage of these defendants, who were acting honestly in the discharge of their duty.

It was also objected, that the judge admitted testimony on the point whether the land, on which the tax was assessed, had been improved by the plaintiff or not. But we think, for the purpose for which it was admitted, as having a bearing upon the question whether Mrs. Green, in paying the tax, acted as agent for her brother or not, and whether she ever did call on him to repay it, it was not improperly received.

It was also contended, that the selectmen had no right to strike the name of the party from the voting list, although they were satisfied that he was not a legal voter. In regard to this objection, if the plaintiff was not a legal voter, it was the duty of the selectmen to strike his name from the list of voters ; and whether done at the meeting, or afterwards, was immaterial. The gravamen of the action is, not that the plaintiff's name was stricken from the list of voters, but that his vote was refused.

On the examination of the case, we are satisfied there were no errors in the rulings and instructions of the presiding judge, to which our attention has been called, and therefore the exceptions are overruled.

Judgment on the verdict

ELISHA PEIRCE *vs.* SETH F. TOBEY & another.

The provision in the Rev. Stat. c. 120, § 18 — that one of two or more joint contractors shall not lose the benefit of the statute of limitations by reason of part payment made by any of the other contractors — extends to contracts and payments made before those statutes were passed.

Where a minor makes a payment on a joint note given by him and an adult, and after he comes of age makes an oral promise to pay the balance, he thereby so ratifies his former payment, that it will take the note out of the operation of the statute of limitations, as to himself, but not as to the adult.

ASSUMPSIT by the payee, against Seth F. Tobey and Joshun B. Tobey, joint makers of a promissory note dated July 3d

1834, payable on demand with interest. Writ dated February 11th 1841. Both defendants pleaded the general issue, and gave notice that they should rely on the statute of limitations as a bar to the action. Seth F. Tobey also gave notice that he should further defend on the ground that he was a minor when the note was given.

At the trial in the court of common pleas, said Seth F. gave evidence that he was a minor at the time the note was made, and that he came of age on the 29th of June 1835 ; and the plaintiff thereupon gave evidence, that said Seth F., after he came of age, made a new promise to pay the note.

With respect to the statute of limitations, as it affected both defendants, the evidence was as follows : On the back of the note were two indorsements of payments, in the handwriting of said Seth F. ; one dated January 21st 1835, and the other dated March 4th 1835. The plaintiff went out of the Commonwealth in 1838, and left the note, for collection, with Roland Peirce, who often called on said Seth F. to pay it, and said Seth F. repeatedly promised payment. In the spring of the year 1840, said Roland, not having received payment, presented the note to said Joshua B., who said it ought to be paid, and took out his money, for the purpose, (as said Roland supposed,) of paying it. Seth F. then came forward and told Joshua B. that he need not pay the note, but that he (Seth F.) "would settle with Peirce," the plaintiff.

When the note was given, the defendants were partners in business, and the partnership was dissolved on the 4th of October 1834.

The defendants contended, that as to Joshua B. Tobey, this evidence was not sufficient to take the case out of the statute of limitations ; because he had neither made any payment, nor any written promise, within six years ; that Seth F. Tobey had made no written promise within six years, and that the payment made by him, on the 4th of March 1835, was during his minority, and was therefore avoidable by him ; and that even if he had been of age, when he made that payment, it would not

revive Joshua B.'s liability, because the partnership had been previously dissolved.

The plaintiff contended, that though Seth F. was under age, on the 4th of March 1835, yet that he had adopted the payment then made by him, by what he had said and promised after he came of age ; and that this was sufficient to take the case, as to both defendants, out of the operation of the statute of limitations.

The court instructed the jury that the evidence was not sufficient, as to either defendant, to take the case out of said statute ; and a verdict was returned for the defendants. The plaintiff alleged exceptions to the instructions given to the jury.

Coffin & S. Miller, for the plaintiff. The promise of payment, made by Seth F., after he came of age, ratified all his former acts, and took the case out of the statute of limitations. and also out of the law of infancy. Chit. Con. (4th Amer. ed.) 124. 647. The plaintiff is therefore entitled, under Rev. Sts. c. 120, § 15, to judgment against him, even if the other defendant be not liable.

Before the Rev. Sts. took effect, payment or acknowledgment by one defendant took the case out of the statute of limitation: as to both. *Hunt v. Bridgham*, 2 Pick. 581. *Whitcomb v. Whiting*, 2 Doug. 651. *White v. Hale*, 3 Pick. 291. *Wood v. Braddick*, 1 Taunt. 104. *Austin v. Bostwick*, 9 Connect. 496. *Patterson v. Choate*, 7 Wend. 441. The St. of 1834, c. 182, § 1, which required that acknowledgments should be in writing, left the effect of a previous payment unaltered. So do the Rev. Sts. c. 120, § 17 ; but § 18 — which declares that a joint contractor shall not lose the benefit of the limitation, so as to be chargeable by reason only of any payment made by his co-contractor — is not to have a retrospective operation. If it was intended to have such operation, it is unconstitutional. *Call v. Hagger*, 8 Mass. 430. *King v. Dedham Bank*, 15 Mass. 447. *Society v. Wheeler*, 2 Gallis. 139. At any rate, § 18 does not apply to partners. If it does, then a yearly payment of interest, for six years, by an active partner, will discharge the other partners. Payment by one partner is payment by all. *Crawshay v. Collins*, 15 Ves. 226. See also *Wyatt v. Hod-*

son, 8 Bing. 309. *Burleigh v. Stott*, 8 Barn. & Cres. 36
Pease v. Hirst, 10 Barn. & Cres. 127.

Eddy & Clifford, for the defendants. The 18th section of c. 120 of the Rev. Sts. is not open to the objection that it is retrospective ; for there was a space of time, after those statutes were passed, and before they went into effect, when the old law on this subject was in force, and the plaintiff, during that time, might have maintained an action against both defendants. *Smith v. Morrison*, 22 Pick. 430. 24 Amer. Jurist, 272, 273. *Penniman v. Rotch*, 3 Met. 216. But that section is as explicit as possible, and Joshua B. Tobey is discharged by it.

Seth F. Tobey has done nothing, since March 4th 1835, which deprives him of the defence of infancy. There must be an *express* ratification, after an infant comes of age, in order to hold him on contracts made during minority. *Whitney v. Dutch*, 14 Mass. 460. See also *Smith v. Mayo*, 9 Mass. 62. *Thornton v. Illingworth*, 2 Barn. & Cres. 824. *Willis v. Newham*, 3 Y. & Jerv. 518. Payment by one not originally liable, or not liable at the time of payment, does not take a demand out of the statute of limitations. *Martin v. Bridges*, 3 Car. & P. 83. *Atkins v. Tredgold*, 2 Barn. & Cres. 23.

DEWEY, J. The statute of limitations constitutes a good defence for Joshua B. Tobey, one of the defendants ; the term of six years having elapsed since the cause of action accrued against him, and no sufficient ground being shown to take the case out of the operation of the statute. The verbal promise of the party to pay the same did not revive the debt and avoid the statute. The St. of 1834, c. 182, § 1, and Rev. Sts. c. 120, § 13, alike required that such "promise be made or contained by or in some writing signed by the party chargeable thereby." The payment of a part of the note, within six years, by Seth F. Tobey, the other joint promisor, did not take the case out of the operation of the statute of limitations as respects Joshua B. Tobey. Independent of the peculiar provisions of the Rev. Sts. c. 120, § 18, it might have been otherwise ; but by this enactment it is expressly provided, that if there are two or more joint contractors, no one of them shall

lose the benefits of the limitation act, so as to be chargeable by reason only of any payment made by any other of them. It is true that the payment was made before the revised statutes went into operation; but this does not prevent the operation of the statute upon this demand. In the present case, the note had been due less than two years when the revised statutes were enacted, leaving the promisee a period of four years to enforce his demand. These statutes may well apply to contracts then in existence, allowing a reasonable time for creditors to institute their actions before the statutes took effect. *Morrison v. Smith*, 22 Pick. 430. *Penniman v. Rotch*, 3 Met. 216.

The case, as to Seth F. Tobey, rests upon a different state of facts, and such as lead to a different result as to his liability. He has made a payment upon this note within six years before this action was instituted, and the effect of such payment, (independent of the question of his minority,) is, to renew his liability for the period of six years from the time of making such payment. But then it is said that he was a minor when he made the original promise, and also when he made the payment upon the note. This is admitted to be the fact; and this would constitute a good defence, if he had not subsequently ratified and confirmed the promise thus made and thus renewed while he was yet a minor. A contract, made by a minor, may be confirmed after his arrival at full age; and if so done, and by words proper to give it force and effect as a valid contract, it will be operative and binding upon him. A mere acknowledgment of a debt as existing, is not sufficient, but there must be a direct promise, or a direct confirmation, before any liability attaches. The case finds such direct promise of payment made by Seth F. Tobey after he came of full age. The further inquiry is, whether this promise attaches to the note, renewed, as it was by the payment made upon the sum by the party. Such we think to be the effect of it. By force and effect of the payment made in 1835, the note became a new promise from that date, and it was such new promise, or at least the original note, with all the consequences attached to it by reason of such payment, that was confirmed and ratified by the maker, by his new

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promise made after he came of age. The effect then of the payment upon the note and of the subsequent new promise by Seth F. Tobey after arriving at full age, is, to remove both grounds of defence relied upon in his behalf. The ruling of the court of common pleas, as it respects Joshua B. Tobey is confirmed; and as to Seth F. Tobey, the exceptions taken must prevail.

New trial granted.

SAMUEL BROWN *vs.* BENJAMIN KING & another.
HANNAH KING *vs.* SAMUEL BROWN.

If the seizin of a party, at a given time, is proved or admitted, the legal presumption is that such seizin continues, and the burden of proof is on him who alleges a disseizin; and that burden remains on him, even after he has given *prima facie* evidence of a disseizin.

If one agrees to buy and another to sell land, and no consideration is paid, nor deed given, and the buyer enters into possession, the fair inference is that the entry and possession are not adverse and a disseizin, but by consent of the owner and in subordination to his title, until payment is made and a deed given, and constitute a tenancy at will. But if, on such agreement, the consideration is paid, and the owner consents that the buyer may enter and hold the land as his own, and the delay in giving a deed is by accident or mistake, or because a deed cannot be immediately procured, and the owner agrees to give a deed, without further consideration or condition, and the buyer thereupon enters into possession; such entry and possession are not to be deemed subordinate to the title of the owner, but as adverse and a disseizin.

In a suit between B. and K., to try the title to land which was extended in execution by K., as the property of D., and which D. was alleged to have acquired by disseizing B., it was held that a deed, made by D. to B., without fraud or duress, and with a knowledge of its purport and effect, in which D. conveyed to B. the buildings which D. had erected on the land, describing them as standing on the land of B., was conclusive evidence that D. recognized B.'s title to the land, and his own interest in the buildings as personal property; and that such deed should take effect against K., although it was executed after he attached the land as the property of D. Where two magistrates, who took a deposition within the Commonwealth, in perpetual remembrance, stated, in their certificate annexed thereto, that "the deponent, being sworn to testify the truth, the whole truth, and nothing but the truth, in the case in hearing before us, made oath to the truth of the foregoing deposition by him made and subscribed," and that the parties interested had due notice and appeared with their counsel; it was held that the deposition was admissible in evidence; especially when objected to by the counsel who were present when it was taken.

THE *first* of these cases was a writ of entry to recover the chambers of a dwellinghouse which was on a lot of land in

Abington, containing about one half of an acre. The demandant, at the trial before the chief justice, proved title by purchase, and it was conceded that prior to 1808 he was seized in fee. The tenant claimed under the levy of an execution made upon the demanded premises, as the real estate of James Dyer, on the first of January 1840—the same having been attached upon mesne process on the 30th of August 1838.

The case stated for the tenants, to prove title in Dyer at the time of the levy, was, that Dyer disseized Brown, the demandant, in 1808 or 1809, and held adverse and uninterrupted possession for more than 20 years, and by force of the statute of limitations obtained a title.

The case stated for the demandant was, that although Dyer entered in 1809, and built a house and other buildings, and enclosed the lot, and had exclusive possession from that time till the time of the levy, yet that the entry was by Brown's permission, and that the holding was not adverse; that the parties considered the buildings as the personal property of Dyer, and that in 1834 a settlement was made, by which Dyer allowed and paid Brown rent for the use and occupation of the land; and that on the 22d of August 1838, Dyer executed a bill of sale to Brown, by which, for a valuable consideration, he sold the buildings to Brown, describing them as standing on the land of Brown.

Evidence was introduced by the demandant, tending to show that Dyer entered on the premises in 1808, enclosed the lot with a fence, built a house upon it, and occupied the house for a dwelling, and the lot for a garden, from that time to the time of the tenants' levy. Dyer testified that he agreed to purchase the land of Brown, in 1808, at the price of \$100; that he and Brown were then in partnership in business; that no payment was made, or deed given, at that time.

There was conflicting evidence upon the question whether in a settlement between Dyer and Brown, in 1834, Dyer made an allowance to Brown for the use and occupation of this land. Lysander Brown, whose deposition was taken *in perpetuum*, and admitted in evidence, testified to the said settlement which

was signed by Dyer, in which were items of charge to Dyer, (as appeared by inspection of the paper, which was produced,) for rent of the premises in controversy. The execution of the abovementioned bill of sale, of August 22d 1838, was also testified to by said Lysander Brown and one Cushing, who attested it as witnesses, and who also testified that Dyer read it and understood its purport.

Dyer testified that he never agreed to pay rent for the land, and never knowingly made any allowance in account for the use thereof; that although he executed the bill of sale, yet he did not know or understand that its purport was to sell the buildings as personal property, and recognize the title of the demandant to the land.

The evidence was left to the jury, with a direction, that if Dyer paid or agreed to pay rent for the use of the land, it was evidence that he was a tenant at will, and not a disseizor: That as to the bill of sale, it was strong evidence that Dyer recognized the demandant's title to the land and his own interest in the buildings as an interest in personal property; and that if the bill was executed by him, without fraud or duress, and with a knowledge of its purport and effect, it must be deemed conclusive.

The jury were also instructed, that as the seizin of the demandant was proved or admitted to have once existed, that seizin must be presumed to continue till proved to be changed, and that the burden of proof was upon the tenants to show such change: That to prove a disseizin by Dyer, it must appear that he entered and held adversely, contrary to the will and intent, and adversely to the title, of the owner: That if he entered and held by the permission and with the consent of the owner, whether any rent was paid, or not, the entry and possession were not adverse, but his possession was a tenancy at will, and not a disseizin: That if Dyer agreed to purchase the land, and Brown to sell it, at an agreed price, but no payment was made and no deed given, and thereupon Dyer entered and erected the buildings, the fair inference would be that the entry was by consent of the owner, and in subordination to his title,

until payment made and a deed given ; and if the entry and possession were by such consent, they were not adverse : That if there was such an agreement for a sale and purchase, and the price was not paid, and if there was an agreement or understanding that Dyer might enter in the mean time and erect his buildings, he would have an interest in such buildings, as personal property, and that his entry and possession would not be a disseizin : That the acts done by Dyer, in building on the land, enclosing and occupying it, would constitute a disseizin, if adverse.

The jury returned a verdict for the demandant.

The admission in evidence of the deposition of Lysander Brown, taken in perpetual remembrance, was objected to by the tenants, because the caption or certificate of the justices, (a copy of which is in the margin,*) did not show that it was taken in the manner required by the Rev. Sts. c. 94.

New trial to be ordered, if said deposition ought not to have been admitted, or if the instruction of the court was not right ; otherwise, judgment to be rendered on the verdict.

W. Baylies & Eddy, for the tenants. The deposition of Brown should not have been admitted, as it does not appear

* Commonwealth of Massachusetts.

Plymouth, ss. Town of Kingston, this 17th day of October, 1840, personally appeared before us, the subscribers, two justices of the peace, in and for the county of Plymouth, one of us being also a counsellor at law, the aforesaid deponent, who being sworn to testify the truth, the whole truth, and nothing but the truth, in the case in hearing before us, made oath to the truth of the foregoing deposition contained on the two preceding sheets, by him made and subscribed. Taken at the request of Samuel Brown of Abington, in the county of Plymouth, yeoman, to be preserved in perpetual remembrance of the thing ; said Samuel Brown having filed with us, on the 13th instant, the statements and request by him signed, and hereto annexed, marked A. And we summoned the said Lysander Brown, and duly notified Benjamin King, Esquire, Ira Nash, Merchant, and Hannah King 2d, single woman, all of Abington aforesaid, of the time and place of taking the foregoing deposition ; at which said time and place the said Benjamin King appeared with his attorney, Zachariah Eddy, Esquire, who also appeared as the attorney of the said Nash and the said Hannah King 2d.

Joseph Sampson, Justice of the Peace, and Counsellor at Law.
Eli Cook, Justice of the Peace.

affirmatively and unequivocally, that he was sworn before he testified, or that it was read to or by him, or that it was written by him or by one of the justices, or by a disinterested person in the presence and under the direction of the justices. The certificate of the "manner of taking it" should have stated all the acts of the magistrates in taking it. Rev. Sts. c. 94, §§ 36. 20-23. *Bradstreet v. Baldwin*, 11 Mass. 233. *Amory v. Fellowes*, 5 Mass. 221. *Welles v. Fish*, 3 Pick. 74. *Bell v. Morrison*, 1 Pet. 355. *The Thomas & Henry v. United States*, 1 Brock. 367. *Nelson v. United States*, Peters C. C. 235. *United States v. Smith*, 4 Day, 127. *Bailis v. Cochran*, 2 Johns. 417. *Coxe's Digest*, 244, 245. Greenl. on Ev. § 323. Besides; the oath, as certified, was to testify "in the case in hearing" before the magistrates, when no case was heard before them.

Dyer had adverse possession, as he occupied and claimed the land as his own. *Lund v. Parker*, 3 N. Hamp. 49. *Proprietors of Kennebec Purchase v. Laboree*, 2 Greenl. 275. *Jackson v. Wheat*, 18 Johns. 40. And though, as a general rule, seizin is presumed to continue, yet such long exclusive possession, as Dyer had in this instance, takes the case out of the rule, and puts the burden of proof upon the demandant. Stearns on Real Actions, 38. 3 Stark. Ev. 1196. *La Frombois v. Jackson*, 8 Cow. 589. *Rehoboth v. Carpenter*, 23 Pick. 136. *Parker v. Locke & Canals*, 3 Met. 102. *Rickard v. Rickard*, 13 Pick. 251. Run. on Eject. 55. *Doe v. Prosser*, Cowp. 218. *Mehaffy v. Dobbs*, 9 Watts, 363. *Law v. Patterson*, 1 Watts & Serg. 184. *Williams v. Nelson*, 23 Pick. 145-147.

The question whether Dyer's possession was adverse was not left to the jury in so open and unrestricted a manner as to give the tenants the full benefit of the facts in their favor.

The jury were wrongly instructed that Dyer's possession must have been against the will and intent of the owner, in order to render it adverse and operate as a disseizin. It has been held that a disseizin may be effected without the owner's knowledge. *Poignard v. Smith*, 6 Pick. 172. It has also been held that an entry and possession, under an agreement or a

purchase, and a payment, though no deed is given, is adverse to the owner. *Barker v. Salmon*, 2 Met. 32. See also *Clapp v. Bromagham*, 9 Cow. 530. *Ex parte Jones*, 4 Younge & Collyer, 466.

Beal, for the demandant. The Rev. Sts. c. 94, have not changed the law as it stood under St. 1797, c. 35, § 3. And the certificate which was prescribed by that statute, did not contain a statement by whom the deposition was written. The decision in *Reed v. Boardman*, 20 Pick. 444, though made in the case of a deposition taken out of the Commonwealth, under a commission, is sufficient to warrant the admission of the deposition in question—especially as the tenants' counsel was present at the taking.

The instructions to the jury, as to adverse possession, when taken together, are open to no exception. The single expression, that the entry, &c. must have been against the demandant's will and intent, was afterwards so qualified as to give the jury the precise law of the case.

The burden of proof was clearly on the tenants to show that the demandant's seizin did not continue. If the whole evidence left this in doubt, the demandant was entitled to a verdict. *Sperry v. Wilcox*, 1 Met. 267.

The *second* case was a writ of entry, in which the demandant counted on her own seizin, and claimed title to the lot of land and the lower story of the dwellinghouse mentioned in the foregoing case of *Brown v. King & another*. The demandant claimed title to the demanded premises, under the levy of an execution, made thereon, as the estate of James Dyer, January 1st 1840, the same having been attached August 18th 1838. This case went to the same jury that tried the foregoing case, and it was agreed by the parties, that all the evidence given in that case, subject to the same exceptions, should be considered by the jury. It was admitted that the tenant was seized in fee of the demanded premises, up to 1808 or 1809; and the demandant relied on a disseizin of the tenant by said Dyer in 1808, or at some later time, and a lapse of twenty years from

and after such disseizin, without entry or claim by the tenant, whereby Dyer obtained an indefeasible estate in fee.

The evidence in this case was similar to that in the preceding, and the instructions to the jury were in substance the same as in that case. Some further statements were made to the jury as to acts, &c. that would or would not constitute adverse possession and work a disseizin; as follows: That if one agrees to buy and the other to sell, and the consideration is paid, and the owner consents that the purchaser should enter and hold the land as his own, and the delay in giving the deed is occasioned by accident or mistake, or because a deed cannot be immediately procured, and the owner agrees to give a deed, without further consideration or condition, and thereupon the purchaser enters; such entry is not to be deemed subordinate to the title of the owner, but an entry and possession by one as owner; and although such parol executed agreement would not pass the estate, nor bar the entry of the owner, yet it would be deemed in law an adverse holding, and a disseizin; and if continued 20 years, without entry of the owner or other interruption, it would bar the owner's entry and right of action: That though, on such contract of sale, the money not paid nor the deed given, the presumption is that it was not intended that the estate should pass, yet this is a presumption of fact, which may be controlled and rebutted by evidence; and therefore if a note or other satisfactory security be given for the purchase money, or any other definite agreement made for the payment of it, and it is understood and agreed that the purchaser may enter and occupy as owner, and the owner does not withhold the deed with an intent to retain the title as security for the purchase money, but agrees to execute a deed without further payment or the performance of any other condition, then the entry of the purchaser, and his exclusive possession as owner, is to be considered as adverse to the title of the former owner; and though it would not pass the estate, because a parol agreement, yet it would constitute a disseizin, and 20 years' uninterrupted possession under it would constitute a title.

The verdict was for the tenant; and the demandant moved

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for a new trial on account of the admission of the deposition mentioned in the preceding case, and the instructions given to the jury.

W. Baylies & Eddy, for the demandant. In *this* case, the bill of sale, which Dyer made of the house, was *after* the demandant had attached it. That sale, therefore, could not affect the demandant's title. It was not tantamount to an entry. Rev. Sts. c. 119, § 8. Stearns on Real Actions, 20, 46, 47, 64. It was, at most, a mere declaration of Dyer, which could not affect the title. No change was thereupon made in the possession. *Bridge v. Eggleston*, 14 Mass. 246. *Davis v. Spooner*, 3 Pick. 284. 18 Vin. Ab. Relation, E. F.

Beal, for the tenant, cited *Church v. Burghardt*, 8 Pick. 327.

WILDE, J. These cases, on trial, were submitted to the same jury, the same questions being raised in both cases, and depending substantially on the same evidence. The principal question was, whether one James Dyer, from whom the Kings have derived their title, had established a valid title by disseizin. On this question the evidence was contradictory, and the question now to be decided is, whether the ruling of the court and the instructions to the jury were correct, or in any respect erroneous.

The jury were instructed that the burden of proof was on the party setting up Dyer's title, to prove that his possession was such as to show that it was adverse to the title of Brown, the legal owner ; and we think that no exception to this part of the charge to the jury can be sustained. It has been argued, that as it was clearly proved that Dyer entered, and had the exclusive possession of the premises, for more than 20 years, taking all the profits to his own use, this was good presumptive evidence that his possession was adverse, and amounted to a disseizin ; and that a *primâ facie* title having been proved under Dyer, it was incumbent on the other party to rebut this presumptive evidence, and that thus the burden of proof was shifted. We have no doubt that this was good presumptive evidence of title in Dyer by disseizin, if there were no other

evidence ; but there was conflicting evidence on the question whether his possession was adverse or permissive. And the burden of proof was on the Kings, who set up his title, to prove that his possession was adverse, and not by the permission of Brown. Where a party grounds his title on an allegation, whether affirmative or negative, he must prove it. Presumptive evidence of title, although sufficient to make out a good *prima facie* case, does not necessarily change the burden of proof. If on the whole evidence, the jury were in doubt whether the possession of Dyer was adverse or permissive, his title must fail. *Sperry v. Wilcox*, 1 Met. 267.

As to the evidence necessary to prove a disseizin, the jury were instructed "that it must appear, that Dyer entered and held adversely, contrary to the will and intent, and adversely to the title, of the owner ; but that if he entered and held by the permission and with the consent of the owner, the entry and possession were not adverse." It is objected, that to prove a disseizin it is not necessary to show that the entry and possession were contrary to the will and intent of the owner. And it must be admitted, that if this part of the instructions stood alone and unexplained, it would be liable to exception. But the meaning is explained by the part of the instructions immediately following. Taking the whole sentence in connexion, the meaning, we think, is sufficiently clear. By the expression, "contrary to the will and intent, and adversely to the title of the owner," nothing more is to be understood, than that the entry and possession of Dyer must appear to have been without the consent and adversely to the title of the owner. The material question for the jury to decide was, whether Dyer's entry and possession were by the permission and with the consent of Brown the owner ; and the instructions objected to must be understood as having reference to that question ; and thus understood, this part of the instructions is perfectly correct.

Another exception is, that the case was not left to the jury sufficiently open. This exception is somewhat indefinite ; but we find nothing in the instructions to support it in any respect. The remarks made as to the inference which might be drawn from

certain facts, if proved to the satisfaction of the jury, are not, we think, open to any valid exception. The jury were instructed "that if Dyer paid, or agreed to pay rent for the use of the land, it was evidence that he was a tenant at will, and not a disseizor." And undoubtedly such a payment or agreement would be evidence, and conclusive evidence, to that effect. So if Brown had been disseized by Dyer previous to 1835, his payment of rent would purge the disseizin. And the conveyance by Dyer of his buildings, described as "standing on the land of Brown," was evidence, as restricted by the instructions, for the jury to consider; although the deed was given after the attachment by Hannah King. Such an admission was equivalent to an entry on the land by Brown. Whether Brown had then the right to enter depended on the other evidence in the case. If he had no such right, this part of the instructions would be immaterial.

The only remaining exception is to the ruling of the court admitting in evidence the deposition of Lysander Brown.

The *first* objection to the caption or certificate of the justices is, that it does not show that the deponent was sworn before his examination. But we think it does appear with sufficient certainty, that the deponent was so sworn. The certificate is in the words of the statute — "the deponent being sworn to testify the truth, the whole truth, and nothing but the truth, made oath to the truth of the foregoing deposition," &c. By this we understand that the deponent was, before the examination, sworn to testify the truth, &c., and that after the deposition was written out, he made oath to the truth of it.

The *second* objection is, that the oath was to testify the truth, in the case then in hearing, when there was no case in hearing before the magistrates. I will not denominate this a captious exception, but it is rather hypercritical, and in our opinion is not supported by any sound and substantial reason.

The *third* and last objection is, that it does not appear that the deposition was written by the deponent or by the justices, or either of them, or by any other person by their direction, or that 't was read to or by the deponent. The certificate as to these

particulars might have been more clear and explicit, and more in detail ; but it is certified that the deposition was *made* and subscribed by the deponent. The meaning seems to be that the deposition was *written* either by the deponent himself, or by one of the justices, or by some other person by their direction ; and that it was read to or by the deponent. If it were not so written and read, it would seem that the justices could not certify of their own knowledge that the deposition was *made* by the deponent. And we do not think this a strained construction of the certificate, considering the circumstances attending the taking of the deposition. One of the tenants' counsel was present, and if the deposition was not taken according to the directions of the statute, it would have been undoubtedly proved. The most favorable construction, therefore, ought to be given to the certificate of the justices, in support of the regularity of their proceedings.

In *Reed v. Boardman*, 20 Pick. 444, it was decided that a deposition, taken under a commission, was rightly admitted, although it did not appear by the certificate of the commissioner that he had conformed, in all particulars, to the rule of court as to the manner of taking the deposition. It was presumed in that case, that the commissioner had conformed to the directions in the rule. A like presumption, and for stronger reasons, might be justified in the present case, whatever construction may be given to the justices' certificate. Every reasonable presumption ought to be made in favor of admitting in evidence a deposition to perpetuate the testimony of a witness ; especially where the counsel of the party objecting to the admission was present at the examination of the witness. And there is no reason to doubt that the deposition was fairly taken, and according to the directions of the statute. The *St.* of 1797, c. 35, § 8, gives the form of a certificate of the caption of a deposition taken *in perpetuum*, which does not require the justices to certify by whom the deposition was written, although the same section requires the deposition to be reduced to writing by one of the justices, or by the deponent in their presence. But this direction was not considered as a condition precedent, a compliance with which

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was to be shown by the caption. It was to be presumed to have been complied with, unless the contrary could be shown. And in this respect there is no reason for supposing that the legislature intended to make any alteration by the revised statutes.

Judgment on the verdicts.

JAMES BARTLETT vs. JOSIAH ROBBINS & others.

Where a suit is brought against three joint contractors, and the writ is served on two only, the two, by pleading the general issue, waive their right to object to the want of service on the third.

In a deed *inter partes*, viz., by and between A. B. and C. on the one part, and D. E. and F. on the other part—after a recital that said D. E. and F. were a committee to purchase a steamboat to run, &c., for an association of subscribers, and that it was probable that they (said D. E. and F.) might find it necessary, in pursuance of said object, to contract debts beyond the amount subscribed therefor—it was agreed by A. B. and C., that if the contracts of D. E. and F., for said object, should exceed the amount subscribed therefor, then they, (A. B. and C.,) would bear and pay to D. E. and F. one half of the amount that their said contracts for said objects should exceed the amount subscribed therefor. *Held*, that this was a joint contract of A. B. and C. *Held also*, that the joint liability of A. B. and C. was not annulled by a subsequent clause in the deed, by which it was mutually agreed, that the advances contemplated to be made by D. E. and F. should be paid equally, and that all profits and losses, arising from such advances, should be paid or borne equally, by all the parties to said deed.

THIS was an action of covenant broken, brought against Josiah Robbins, Daniel Jackson and Charles Brown, upon the instrument in the margin,* and the declaration alleged that the

* This agreement, made this twelfth day of Nov. 1828, by and between Josiah Robbins and Daniel Jackson, jr. of Plymouth, in the county of Plymouth and Commonwealth of Massachusetts, and Charles Brown of Boston, in the county of Suffolk and State aforesaid, on the one part, and James Spooner, Jacob Covington and James Bartlett, jr., of Plymouth, in the county of Plymouth and Commonwealth of Massachusetts, on the other part, witnesseth: That whereas the said Spooner, Covington and Bartlett are a committee to purchase a location and build a wharf in Plymouth, and to purchase and establish a steamboat to run between Plymouth and Boston, for and in behalf of an association of subscribers for that object; and whereas it is probable that the said Spooner, Covington and Bartlett, in pursuance of said object, may find it necessary to contract debts on account of said wharf and steamboat, over and above the

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defendants therein covenanted with the plaintiff, together with Jacob Covington and James Spooner, both since deceased. The writ was duly served on said Robbins and Jackson. No other service was made on said Brown besides that which appears in the following return of the officer on the writ : " Plymouth ss. July 26, 1841. The within named Charles Brown has not, to my knowledge, any property in my precinct, nor resided within the United States for the last five or six years, nor any agent, tenant or attorney in my jurisdiction. I, by the direction of the creditor's attorney, left a summons for said Brown at the last and usual place of abode of said Josiah Robbins. Said Brown had a family living in Plymouth."

The defendants, Robbins and Jackson, craved and had oyer of the instrument declared on, and pleaded the general issue, annexing to their plea a specification of their grounds of defence. They afterwards, (at the last May term,) moved for a nonsuit, on the ground of misjoinder of parties, and contended *first*, that the contract of the defendants was several and not joint, and that no action thereon could be maintained against the defendants jointly ; and *secondly*, that whether said contract was joint or several, no action could be maintained against Robbins and Jackson, without joining Brown, the other covenantor, and that no sufficient reason appeared, on the officer's return, for not making service on Brown.

A nonsuit was entered by consent, subject to the opinion of the whole court.

amount subscribed for that purpose : It is therefore agreed, and we, the said Robbins, Jackson and Brown do hereby agree, that in case the contracts of said committee, for the abovesaid wharf and steamboat, shall exceed the amount subscribed for that purpose, then we will bear and pay to said Spooner, Covington and Bartlett one half the amount that their said contracts for the said wharf and steamboat exceed the amount subscribed for that purpose.

It is the mutual agreement of the parties hereunto, that the above contemplated advances shall be paid equally by the subscribing persons, and that all profits and losses arising from such advances shall be divided or borne equally by the subscribers hereto.

In testimony whereof we hereunto set our hands and seals. (Signed and sealed by the six persons above named.)

Eddy & Gilbert, for the defendants, contended that the contract was several and not joint, and cited Perk. § 107. *Hammond on Parties*, 21. *Ernst v. Bartle*, 1 Johns. Cas. 319 *Slingsby's case*, 5 Co. 18 b. *Johnson v. Wilson*, Willes, 246 *Lilly v. Hodges*, 8 Mod. 166. *Withers v. Bircham*, 3 Barn. & Cres. 254. *Ludlow v. McCrea*, 1 Wend. 228. *Eccleston v. Cliphsham*, 1 Saund. 153. *Mathewson's case*, 5 Co. 22 b.

W. Thomas, for the plaintiff. There must be express words, in order to create a separate liability in case of any joint contract, or a several interest must be so manifest on the face of the contract as to be equivalent to express words. And in a deed *inter partes*, like that in question, a several legal interest is seldom if ever created by any form of expression. *Spencer v. Field*, 10 Wend. 91. Yelv. (Amer. ed.) 177, note. 1 Chit. Pl. 3, 4. 1 Esp. Dig. 288. As the first part of the deed contains a contract clearly joint, the latter part, if inconsistent therewith, is inoperative. *Hammond on Parties*, 16.

SHAW, C. J. A nonsuit was entered in the present case, for the purpose of taking the opinion of the whole court upon two preliminary questions, the decision of either of which against the plaintiff would have been decisive of the case.

This was an action of covenant, against three, and service on two; but it was contended that no sufficient service was made on Brown, and therefore that the suit could not be maintained against the other two. After the two had pleaded the general issue, they moved to dismiss the action for want of a sufficient service on Brown.

Brown is in form made a party to the suit, being included in the writ and declaration. If he was rightfully summoned, according to the statute, though out of the State, he must either appear and plead, or be defaulted; and in the latter case, the suit would rightfully proceed against the other two. But if he was not rightly summoned, (of which we give no opinion,) we are of opinion that the defendants could take no advantage of it, except by plea in abatement. But it is too late to plead in abatement, after pleading the general issue. And even if it were open for a motion to dismiss the action for want of legal service

on one of the defendants — being a right for their benefit, which they might waive, and proceed to the merits — they must be deemed to have waived the exception to the service, by having pleaded. *Simonds v. Parker*, 1 Met. 508.

The other question is, whether the contract by the three defendants with the plaintiff and his two deceased co-covenantors, Covington and Spooner, was a joint contract, or several. If the latter, a suit against the three, or either two of them, cannot be maintained.

This contract is quite obscure. To some extent, the different clauses are contradictory, and it is difficult to ascertain the intentions of the parties. Whether a contract is joint or several may depend upon the use of those terms, or upon the obvious nature of the undertaking. *Eastman v. Wright*, 6 Pick. 316.

In the first place, this is a contract, in terms, *inter partes*, between Robbins, Jackson and Brown, on the one part, and Spooner, Covington and Bartlett, on the other part. After certain recitals, it proceeds thus: "And the said Robbins, Jackson and Brown do agree, in case, &c., then we will bear and pay to said Spooner, Covington and Bartlett one half the amount of their said contracts." This would appear very clearly to constitute a joint stipulation, by the three composing the party of the second part, with the three composing the party of the first part. The only doubt thrown upon it arises from the succeeding and closing provision, which is this: "It is the mutual agreement of the parties hereunto, that the above contemplated advances shall be paid equally by the subscribing persons, (viz. the six,) and that all profits and losses arising from such advances shall be divided and borne equally by the subscribers."

On the whole, though it is difficult to reconcile the provisions of this short contract, we are of opinion, that this latter clause does not annul or control the plain and direct stipulation, by which the three defendants stipulated, in a certain event, which is alleged to have occurred, to pay a sum of money to the three covenantors, of whom the plaintiff is the survivor; and therefore that the action may be maintained.

Nonsuit taken of.

WILLIAM BRADFORD vs. ELLIS DREW.

A. shipped on board B.'s vessel for a fishing voyage, and signed a shipping paper in which it was agreed that A. should have a certain proportion of the fish that he should take on the voyage, or the proceeds thereof, and that B. should render to A. an account of the delivery or sales of all such fish: Before the vessel sailed on the voyage, A. drew an order on B. requesting him to pay to C., or order, a certain sum, at the end of the voyage, if he (A.) should make enough to pay said sum; which order B. accepted. In a suit against B. on this acceptance, it was held that by 'the end of the voyage' was not meant the arrival of the vessel, but the sale of the fish. Held also, that although it was proved that B. might have sold the fish, soon after the arrival of the vessel, for a sum sufficient to pay the order, and that, by delaying the sale, he did not obtain a sum sufficient for that purpose; yet if he acted in good faith, and sold the fish within a reasonable time, he was not liable to the holder of the order; and that, for the purpose of proving that he acted in good faith, and made the sale in a reasonable time, evidence was admissible of the custom of those employed in like fishing voyages to delay the sale of fish as long as B. had delayed in this instance.

ASSUMPSIT on the following order accepted by the defendant on the day of its date: "Plymouth, May 18, 1839. Mr. Ellis Drew: Sir: Please to pay William Bradford, or his order, \$24.90, at the end of my voyage in the schooner Columbus on a fish voyage, if I make enough to pay, after taking out \$10 I now owe you. Benjamin Battles." The money counts were added.

At the trial in the court of common pleas, it was in evidence that in May 1839, said Battles went on a fishing voyage in the schooner Columbus, of which the defendant was owner. That by the shipping paper which was signed by the defendant, as owner, and by the crew, of which said Battles was one, it was agreed that the fish, or the proceeds of the fish, that might be caught on board said schooner, by the master and fishermen — after deducting the expense for general supplies, which were to be furnished by said owner — should be divided as follows; viz. to the owner, for his share, one quarter part thereof; to the shoreman, for curing the fish, one eighth part; to the skipper, for privilege, &c., one sixty fourth part; "and the residue to and among the fishermen, including the master, in proportion to the number of fish they may respectively have caught." There was the following clause in said shipping paper: "The said

owner doth stipulate to and with said master and fishermen, that he will render a just and true account of the delivery or sales of all the fish that may be delivered to him or his agent, by said master of said schooner, or by the fishermen employed on board said schooner, and will account with said master, and with each fisherman, employed as aforesaid, for their respective shares of said fish, delivered as aforesaid, and for their interest in said fishing voyage," &c.

It was also in evidence that said schooner returned early in September 1839, and that the fish, which she brought in, were put into the hands of Samuel Doten, by the defendant, to be dried, and remained in his custody until they were sold, as hereinafter stated: That about fifty quintals of said fish were fully dried on the last of October following; that "one or two more days' drying would have completed the drying of the remainder, and that the drying of the remainder might then have been completed by one or two more days' drying early in March following:" That the defendant called upon said Doten, on the last of said October, to ascertain the state of the fish, and told Doten that he (the defendant) should not sell them that autumn, but wished them to be in good order; and that said Doten then told him, that if he meant to keep the fish till spring, "they ought not to be dried any more then; to which the defendant agreed."

The plaintiff gave evidence that the fish might have been sold in the autumn of 1839, and also about the middle of March 1840, for such a price as would have produced a sum that would have left, on the adjustment of the voyage, a sum in the defendant's hands, belonging to the share of said Battles, sufficient to pay the amount of said order, over and above the ten dollars mentioned therein.

The defendant offered to prove that in his making up of the voyage, and crediting it with the actual sales of the fish, &c., belonging thereto, which were sold after the middle of March 1840, there was no balance due to said Battles, after deducting the said ten dollars; and also to prove that by the custom of the fishing business, the fares of fish were never weighed off, nor the voyage made up, until the actual sale; and likewise that it

was the custom for owners of fishing vessels to keep the fish on hand till the spring following the season when they were caught. But the court ruled that this evidence was not admissible.

There was no evidence that either Battles or the plaintiff ever requested the defendant to make an earlier sale of the fish, or to deliver Battles's proportion of the fish *in specie*.

The order was not presented to the defendant for payment, until after he had sold the fish and made up the voyage, as aforesaid.

The defendant insisted that he, acting in good faith, and according to the custom of such voyages, was not liable beyond the amount of the proceeds of the sales. But the jury were instructed "that by 'the end of the voyage,' mentioned in the order, was meant the time when the fish were or might be made fit for market; and that if the jury were satisfied by the evidence, that the fish were or might have been fit for market in October 1839, or by the middle of March 1840, and that, if sold at either of those times, if they then were or might have been fit for market, would have produced such sum that Battles's share would have amounted to \$24.90, over and above the ten dollars, they should find a verdict for the plaintiff."

A verdict was returned for the plaintiff, and the defendant alleged exceptions to the ruling and instructions of the court.

J. H. Loud, for the defendant.

Gilbert, for the plaintiff.

SHAW, C. J. The defendant's acceptance was of a conditional order, and only bound him to pay the sum named out of the proceeds of the drawer's share in the fishing voyage described, first deducting a sum already advanced. It was payable at the end of the voyage, but only in case the drawer should "make enough" to meet it. The term "end of the voyage" could not be construed literally, viz., the arrival of the vessel, because the fish would then be green, and not in a marketable condition. But further; the order was, to be paid in money, if "enough" &c.; both which clauses imply that the fish were first to be sold, and converted into money, both to determine the

amount coming to the drawer for his share, and to put the acceptor in funds to pay it.

Supposing the acceptance not payable till the sale of the fish, still it might be contended that, as the whole authority to sell was in the owner, the present defendant, if he unreasonably neglected to make sale, might be held, at the election of those interested, to have made them his own by his laches, so as to be accountable for the value, in cash. *Porter v. Blood*, 5 Pick. 54.

Upon the point of reasonable diligence, the court are of opinion that the usage of owners, in regard to the time and mode of sale, ought to have been received. Every person making contracts in reference to any course of trade, or branch of business, is presumed to be acquainted with the usages of that business; and in the absence of express and controlling stipulations, he is presumed tacitly to consent that the business shall be conducted conformably to the usage. Further; it was a question of seasonableness, as to the time of the sale of the fish by the owner. Now, the usage of other owners, as to the sale of their own fish, has a strong bearing upon the question of seasonableness and propriety, as to the time of selling. *Noble v. Kennoway*, 2 Doug. 510.

For these reasons, the court are of opinion that the evidence of usage and custom in regard to the fishing business, which was offered at the trial, and rejected, ought to have been received, and that the jury ought to have been instructed, that if the defendant acted in good faith, and sold the fish within reasonable time — of which the usage and custom of the trade would be good evidence — and if upon such sale, and making up of the accounts of the voyage, there was nothing due to the drawer of the order, the defendant was entitled to a verdict.

Verdict set aside, and a new trial granted

**EZRA FINNEY & others vs. THE FAIRHAVEN INSURANCE
COMPANY.**

Where a part owner of a vessel effects insurance for himself and the other owners, without their previous authority, they may ratify his act after they obtain knowledge of the loss of the vessel : And the bringing of an action on the policy, in their names, is a sufficient ratification of his act.

ASSUMPSIT on a policy of insurance on the barque *Volante*, on a whaling voyage from Sippican, a port in Rochester, and back to said port. The plaintiffs, at the trial, gave in evidence the policy, dated October 12th 1839, by which the defendants caused John S. Bates, for himself and other owners, to be insured \$10,000 on said barque and outfits, one half on each, as valued in the margin. To prove an insurable interest in the plaintiffs, and a right to maintain this action, they relied on the terms of the policy, viz. "for himself and other owners," and proposed to prove the ownership of the plaintiffs, without any other evidence of the authority of said Bates to make insurance for the owners, the present plaintiffs, besides that which arose from their bringing this action.

It was ruled by the judge before whom the trial was had, "that the policy being made by Bates for himself and the other owners, it was sufficient to cover the interest of all those owners for whom he had a right to act, and constituted a contract between the defendants and all such owners, on which they might bring an action, and that the fact of ownership might be proved by evidence *aliunde* ; that if Bates had authority to act for them, the contract would enure to their benefit, and that they might bring an action upon it, as well as if their names had been expressed ; and that such authority might be express or implied : But that the mere act of bringing an action for the loss was not sufficient evidence from which a jury could infer either an original authority or subsequent ratification, so as to make them parties to the contract, to supply the want of direct proof of original authority : That when subsequent ratification is relied on, without proof of original authority, there must be proof of some act

of recognition, or of express or implied ratification, before knowledge of the loss."

The plaintiffs thereupon became nonsuit, and the point was reserved for the consideration of the whole court. Nonsuit to be set aside, if the evidence should have been left to the jury without further proof on this point.

Eddy & W. Thomas, for the plaintiffs, cited *Hagedorn v. Oliveron*, 2 M. & S. 485. *De Bollé v. Pennsylvania Ins. Co.* 4 Whart. 68. *Routh v. Thompson*, 13 East, 274. *Lucena v. Craufurd*, 1 Taunt. 325 : 2 New Rep. 269. *Buck v. Chesapeake Ins. Co.* 1 Pet. 159. *Parish in Sutton v. Cole*, 3 Pick. 232. *Marr v. Plummer*, 3 Greenl. 73. *Sargent v. Morris*, 3 Barn. & Ald. 280, 281. *Bridge v. Niagara Ins. Co.* 1 Hall, 247. *Turner v. Burrows*, 5 Wend. 541 : 8 Wend. 144. Story on Agency, § 239. 1 Phil. Ins. (2d ed.) 157 : 2 ib. 727. *Williams v. Ocean Ins. Co.* 2 Met. 303.

C. P. Curtis & Gifford, for the defendants. That Bates, merely by his authority as part owner, could not insure for the other owners, has long been settled. *French v. Backhouse*, 5 Bur. 2727. *Campbell v. Stein*, 6 Dow, 116. *Finney v. Warren Ins. Co.* 1 Met. 18.

There is this qualification of the doctrine of the ratification of acts done without previous authority, viz. if the act done by an unauthorized person would, if authorized, create a right to have some act or duty performed by a third person, so as to subject him to damage or loss for non-performance, then a subsequent ratification will not give validity to it, so as to bind such person to the consequences. Story on Agency, § 246. There are cases in which an act done without previous authority may become beneficial to the person for whom it was done, by his subsequent adoption of it ; but this holds only where no immediate act is to be done upon it by a third person. Paley on Agency, (Lloyd's ed.) 345. The validity of a ratification, *where no act of another is founded upon it*, does not depend upon its being communicated. Per Morton, J. 24 Pick. 203. If the unauthorized contract of Bates can be adopted by the other owners, so as to bind the defendants *ab initio*, it binds

them to all losses and damages arising from a contract of insurance, at the pleasure of the owners, during a long voyage, without the defendants being able, at *their* pleasure, to enjoy the benefits of the contract. If the voyage had been successful, the owners might have refused to ratify the contract, and chosen not to be insured ; and Bates might have well declared that he had no authority to contract for them. See *Steinback v. Rhinelander*, 3 Johns. Cas. 269. *Foster v. United States Ins. Co* 11 Pick. 85.

An agent, who insures for his principal, has authority to abandon the cargo ; *Chesapeake Ins. Co. v. Stark*, 6 Cranch, 268 ; and to settle the loss, if he has possession of the policy. 6 Mass. 196. The master becomes agent of the assured, on a legal abandonment. Whose agent is he, before the owner ratifies the contract of insurance ? The underwriters may accept an abandonment made by one assuming to be agent, and act upon it, and yet the owner may disavow the whole proceeding. If they call for proof of the agent's authority, they may lose their premium ; and if they pay the loss to him, he may not account to his supposed principals. See *Grant v. Hill*, 4 Taunt. 380.

The principal ought to elect, before the loss occurs, whether to adopt the contract of insurance, and not "to pause and wait" for events. *Prince v. Clark*, 1 Barn. & Cres. 190. *Clement v. Jones*, 12 Mass. 64.

The cases of *Lucena v. Craufurd* and *Routh v. Thompson*, cited for the plaintiffs, involved the prerogative of the crown. The assured were officers of the government, and so far agents, in some degree, by previous authorization. In *Barlow v. Leckie*, 4 Moore, 8, the jury found that the policy was effected by order of the owner of the goods. *Hagedorn v. Oliverson*, 2 M. & S. 485, is the only case in which it clearly appears that the owner may, by adopting a policy, (made without authority,) after a loss has happened, entitle himself to the benefits of the contract, as if he had previously authorized it and bound himself for the premium. And in all the foregoing cases, there was some express act of adoption — by the king in council, in the prize cases, or by the party, by letter or otherwise — before suit

brought. In the case at bar, the plaintiffs claim the benefit of the policy, without any act of adoption or ratification, besides that of their names appearing in an action on it to recover the loss. The declaration shows that the loss happened in January, and that the action was not brought till November following. During all this time the plaintiffs were *pausing and waiting for events*. A ratification must be made in a reasonable time. See *Right v. Cuthell*, 5 East, 491. *Bell v. Jutting*, 1 Moore, 155.

Palmer v. Marshall, 8 Bing. 79, is an authority to show that the mere commencement of a suit is not a sufficient adoption of a contract. One ground on which the court granted a new trial was, that the plaintiff had not *produced evidence* of the authority of his agent to make the contract. This case was wrongly decided, if bringing the action in the name of the party interested is a sufficient adoption of the contract : And so of every case that has been decided against a plaintiff on account of want of previous authority to effect the insurance. For there seems to be no clear distinction between the effect of an action in the name of the party interested, (as in *Palmer v. Marshall*,) or in the name of the agent, if the party interested appears, to adopt and prosecute it. If this doctrine is established, that class of cases, like *Foster v. United States Ins. Co.* 11 Pick. 85, where insurance was made by a ship's husband, or part owner, &c. will no more appear ; for a subsequent adoption of his act will place the other parties on the ground of a previous authorization. See also *Doe v. Walters*, 10 Barn. & Cres. 626 ; *Bailey v. Culverwell*, 8 Barn. & Cres. 448 ; *Peters v. Ballistier*, 3 Pick. 495 ; where it was held that the commencement of a suit was not a sufficient adoption of the act on which the suit was founded.

When this policy was made there was no consideration therefor, as between the plaintiffs and the defendants. And the premium paid for the policy may be recovered back, in whole or in part, if the insurance did not attach, or attached only partially. 2 Phil. Ins. (2d ed.) 526. 3 Johns. Cas. *ubi sup.*

HUBBARD, J. On the ruling of the presiding judge, two questions arise : The first, whether Bates, in his capacity of

part owner, had, by force thereof, an authority to effect insurance for the other owners ; the second, if no previous authority existed, whether a ratification by the other owners, after a knowledge of the loss, will enable them to maintain the present action.

As to the first point, it was long since determined that one part owner had no authority to insure for the rest of the owners, although such part owner was also the ship's husband. *French v. Backhouse*, 5 Bur. 2727. Subsequent cases have confirmed this decision. *Ogle v. Wrangham*, Abbott on Ship. (4th Amer. ed.) 76. *Bell v. Humphries*, 2 Stark. R. 345. The same decision has taken place in our own court, in the case of *Frater v. U. S. Ins. Co.* 11 Pick. 85. The plaintiffs therefore cannot sustain this suit on the ground that the insurance was effected by a part owner.

The second point is, whether a ratification by the other owners, after a knowledge of the loss, will enable the plaintiffs to maintain this action. That the ratification of a contract, made by an unauthorized agent, is equivalent to a preceding authority to make it, is a principle of the common law ; and the only inquiry is, if this case is embraced by the principle. This general rule is not denied ; but the defendants contend that the case at bar is not governed by it, because the parties do not stand on the like ground, nor enjoy equal rights. It is argued, that the part owners, on hearing of the safe arrival of the vessel, may refuse to ratify the act of their cotenant, and that in consequence of their refusal the underwriters will have no claim against them for their premium ; while in case of loss, the owners can enforce the contract against the underwriters ; and thus there is no mutuality in the case.

This reasoning has been urged in previous cases, and though it is not without its force, yet the answer to it is, that the agent or part owner who effects the insurance is himself liable for the whole premium ; because the whole property is at the risk of the underwriters, as the owners may at any time adopt the act, the policy being made for their benefit. And it may be also said that in making the contract, the insurers, having been will-

ing to look to the part owner for their premium, without calling for his authority, cannot justly complain, if, from any cause, the other owners, by disavowing the act, do not render themselves personally liable for the payment of the premium.

That the contract of the agent or part owner may be adopted after a knowledge of the loss, was determined in the case of *Routh v. Thompson*, 13 East, 274, where the point came before the court. But the question was afterwards fully considered and distinctly decided in *Hagedorn v. Oliverson*, 2 M. & S. 485. In that case, insurance was effected by an agent, and his act was not ratified by the principal, till after a knowledge of the loss. Bayley, J. in giving his opinion says, "a loss has happened, upon which the defendant undertook to pay, and if the premium could not have been recovered back from the defendant, there is not any circumstance here which should exonerate him from liability. I think the plaintiff never could have recovered back the premium from the underwriter, because of the uncertainty whether Schroeder" (the principal) "would adopt the insurance, in respect of which the underwriter would have incurred the risk. While the contract was *in fieri*, there was not any disposition, on the plaintiff's part, to have the policy vacated, and if there had been, it would have been an answer to him, that Schroeder might have adopted it." And he closes by saying, "the case of *Routh v. Thompson* shows that if a policy be effected with reference to the benefit of a person interested, an adoption of it by such person after the loss will be sufficient." See also 1 Phil. Ins. (1st ed.) 61. And in Story on Agency, §§ 246, 248, the same doctrine is maintained and enforced.

It was argued that the present case was the same with that of *Foster v. United States Ins. Co.* 11 Pick. 85. But though the cases have strong features of resemblance, there is, among other distinctions, this difference between the two; viz. that in that case the action was brought in the names of the agents, who effected the insurance, without other proof of ratification; while in the present case, the parties adopt the act by commencing the suit themselves.

Nonsuit taken off

CHARLES McCLEES *vs.* TAMERLANE BURT.

An action of *assumpsit* may be maintained in this State, upon an instrument made in another State, and which, by the law of that State, is a specialty, if by the law of this State it is a simple contract.

In a suit by A. on a note given to him in satisfaction of a judgment recovered against the promisor by B., the promisor cannot defend by showing that A., before said judgment was recovered, purchased of B. the demand which was the subject matter thereof, and afterwards, on the trial of the action, testified as a witness against the promisor.

A note given by a judgment debtor to the assignee of the judgment, in part payment thereof, is on a sufficient consideration.

ASSUMPSIT on this instrument: "Six months after date, with interest from date, I promise to pay Charles McClees, or order, the sum of two thousand seven hundred twelve dollars and ¹⁰/₁₀₀, for value received this 6th of April, 1840. Tamerlane Burt. (Seal)." No seal was affixed to the instrument, but the word 'seal' was added to the defendant's name, and was encircled with a line of the pen.

At the trial in the court of common pleas, before *Strong, J.* the defendant contended that the instrument was under seal, and objected to its being admitted in evidence to support the action of *assumpsit*. This objection was overruled.

The defendant then offered evidence that said instrument was given in consequence of the recovery of a judgment against himself, Luther Babbitt, Gilbert W. Strange and Asa Paul, in an action of John Sikes, at the March term, 1840, of the superior court for Tyrrel county, North Carolina; that in the trial of said action, the present plaintiff was a material witness for said Sikes, both as to the maintenance of the action and the amount of damages, and yet that, at the time of said trial, he had purchased and was the owner of the subject matter of said action; and that the present defendant, at the time of his executing the instrument now in suit, did not know nor suspect that the interest in the said judgment, or that the interest, at the time of said trial, in the subject matter of said action, was in the present plaintiff. This evidence was not admitted.

There was evidence that John Sikes of North Carolina, at

the term above mentioned of the superior court of that State, recovered judgment, in two actions of trespass for cutting his wood and timber, against the present defendant and the three other persons abovenamed; that said Luther Babbitt, alone or in connexion with said Asa Paul, was charged with the defence of said actions — the present defendant being then in Massachusetts; that the present defendant, soon after said judgment was recovered, went to North Carolina, and executed the instrument now in suit, which was for half the amount of said judgment — being the portion of himself and said Gilbert W. Strange — which instrument was intended as satisfaction of said judgment, so far as said Strange and the present defendant were concerned; and that the present plaintiff then and there acknowledged, in writing, that he had received of the present defendant “\$2712.50, the one half of a judgment recovered against Babbitt, Burt, Paul and Strange, in favor of John Sikes,” &c.

The defendant objected that this evidence did not show a sufficient consideration for the instrument declared on, and that the same was without consideration. The plaintiff then offered evidence to prove that said Sikes assigned said judgment to him before said instrument was executed; and the judge stated, that if such assignment should be proved to have been so made, there would be a sufficient consideration for the instrument declared on. The evidence was received, and the counsel for the defendant “declined going to the jury upon the question whether there was such an assignment before the instrument declared on was executed.” Whereupon the jury, under the direction of the judge, found a verdict for the plaintiff. The defendant alleged exceptions to said rulings and directions.

Holmes, for the defendant. 1. The defendant should have been permitted to show the fraud of the plaintiff in testifying in a cause which was in fact, though not then known to be, his own. No one is permitted to take advantage of his own wrong.

2. The instrument declared on is a specialty in North Carolina, where it was executed, and assumpsit will not lie upon it 4 Kent Com. (3d ed.) 452. See also *Richards v. Killam*, 10 Mass. 239.

Coffin, for the plaintiff, cited *Homer v. Fish*, 1 Pick. 435, to the first point; and *Warren v. Lynch*, 5 Johns. 239, and Story's Conflict of Laws, §§ 556 – 558, to the second.

WILDE, J. At the trial of this case in the court of common pleas, several exceptions were taken by the defendant's counsel to the rulings and decisions of the presiding judge, none of which, in our opinion, can be sustained. The first exception is, that the writing on which the action is founded appears to be a sealed instrument, and consequently that the action should have been an action of debt or covenant. But this does not appear by the writing produced in evidence. According to the common law, and the law of this Commonwealth, this is not a writing under seal, nor is it placed on the same footing with specialties or contracts under seal. If the law of North Carolina, where the contract was made, be otherwise, it should have been proved. Such proof, however, would not avail the defendant, it being a well settled rule of law, that in deciding a question as to the form of action for the breach of a contract made in a foreign state or nation, the *lex fori* and not the *lex loci contractus* must govern. *Warren v. Lynch*, 5 Johns. 239. *Pearsall v. Dwight*, 2 Mass. 90. *Bank of United States v. Donnelly*, 8 Pet. 361. *Andrews v. Herriot*, 4 Cow. 508. *Don v. Lippmann*, 5 Clark & Fin. 1. *Trasher v. Everhart*, 3 Gill & Johns. 234.

Another exception is, that the evidence offered by the defendant to prove the invalidity of the judgment, for the discharge of which in part the contract in question was made, was illegally excluded. As the defendant was a party to that judgment, it is very clear, we think, that he cannot collaterally impeach it in this action. The case of *Homer v. Fish*, 1 Pick. 435, and the cases there cited, are decisive on this point. If that judgment was fraudulently obtained, the defendant's remedy is by application to the court, that rendered it, to vacate it. And if by the laws of North Carolina it may be vacated by a writ of review or otherwise, the defendant will not be deprived of his remedy, by the plaintiff's recovery against him in the present action. Considering that judgment as valid, it cannot be doubted that the discharge of it in part was a good consideration for the contract in suit.

Exceptions overruled.

FANNY F. RICHARDSON vs. ANNIS A. LINCOLN.
THE SAME vs. THE SAME.

In an action by an indorsee against one who signed a promissory note on the back thereof, the indorser is a competent witness to prove that the defendant signed the note at the same time with the promisor whose signature was on the face of the note.

Where the payee of a promissory note, which is in the hands of his attorney, indorses it *bonâ fide* to a third person, and leaves it in the attorney's hands for the use of the indorsee, the attorney thereby consents to hold it for the indorsee, and becomes his agent; and if the attorney bring an action on the note in the indorsee's name, which he sanctions, this is proof of actual transfer and constructive delivery of the note, though the indorsee never sees it.

An indorsement of a note 'without recourse,' transfers the whole interest therein, and merely rebuts the indorser's liability to the indorsee and subsequent holders. But such indorsement, with other circumstances, may tend to show that the note was not indorsed for value, so as to prevent the promisor from making the same defence, in an action by the indorsee, which he might make in an action by the promisee.

THESE were actions upon two promissory notes, one dated December 22d 1837, for \$ 80, and the other dated October 22d 1838, for \$ 200. The notes were signed by Lemuel Arnold jr. on the face, and by the defendant on the back; they were made payable to Zaccheus Richardson, or order, and were indorsed by him. Trial in the court of common pleas, before Strong, J.

The plaintiff declared against the defendant as original promisor, and called the payee, Zaccheus Richardson, as a witness, to prove that the note was signed by the defendant simultaneously with Arnold. The witness was admitted, though objected to by the defendant.

It appeared in evidence, that two former actions had been commenced on these notes, and entered in court, in the name of said Zaccheus, the payee, in which actions he became non-suit. Before the former actions were commenced, the notes were placed, by said Zaccheus, in the hands of Sidney Williams, Esq. who commenced the former and the present actions. The defendant contended that the indorsement of the notes to the present plaintiff, (who was shown to be the daughter of said Zaccheus, and to live in the same house with him,)

was not *bonâ fide*, but collusive and fraudulent, to enable the said Zaccheus to be a witness ; and that he was still the owner of the notes. This question was submitted to the jury.

Said Zaccheus testified that the contract by which the notes were sold by him to the plaintiff, and the payment received by him, were at his house ; that he believed what was written over his name on the note was written by Mr. Williams, who brought the actions, and in his office, and that the plaintiff was not present ; that he negotiated both notes to the plaintiff at the same time ; that this transfer of the notes to her was after he had commenced suits thereon in his own name, and before the commencement of the present actions ; that he never took the notes out of Mr. Williams's possession after they were left with him for the purpose of bringing the former actions ; that he had never touched a pen to them since he delivered them to Mr. Williams ; and that he placed his name on the back of said notes, as he believed, before the commencement of the former actions.

Sidney Williams Esq. testified that the body of the indorsements was written by him, in his office, a short time before the commencement of the present actions : That the notes were put into his hands about a year before suits were brought on them by said Zaccheus, who then owned them ; that nonsuits were entered in those suits, and that the body of the indorsements was afterwards made to transfer the notes to the plaintiff : That he (the witness) could not say when he first saw the name of said Zaccheus on the back of the notes, but that his name was there before the present actions were commenced.

It did not appear that the notes had ever been out of Mr. Williams's office, after they were first lodged there by said Zaccheus, or that the plaintiff had ever been in said office.

The counsel for the defendant contended that if the sale of the notes to the plaintiff, at her father's house, was *bonâ fide*, yet the property in them did not pass, for want of delivery ; as the evidence showed that they must have been indorsed to her at Mr. Williams's office, where there was no one to receive them for her.

The judge instructed the jury, "that if the sale of the notes was *bonâ fide*, the property therein would pass; either no delivery was necessary, or, from the time of the sale, Mr. Williams would be the agent of the plaintiff; and the note, being in Williams's possession, would be a sufficient delivery to the plaintiff."

The jury found a verdict for the plaintiff, in both cases, and the defendant alleged exceptions to the foregoing decisions and instructions.

Coffin, for the defendant.

Eliot, for the plaintiff.

SHAW, C. J. The principal question of law arising upon these exceptions is, whether Zaccheus Richardson, the payee and indorser of the note, was a competent witness.

The defendant not being the payee of the note, having put his name upon it in blank, he must be considered an original promisor and surety, if he so put his name upon it simultaneously with the promisor, as an original contractor. *Hunt v. Adams*, 5 Mass. 358: 6 Mass. 519. *Samson v. Thornton*, 3 Met. 275. The object of offering the father as a witness was to prove that fact. He had formerly brought suits in his own name, and became nonsuit, probably on account of the want of proof, upon the point mentioned. He then negotiated the notes to his daughter, who now sues as indorsee. The case places the father in a situation, in which he had a strong bias in favor of the plaintiff; but that is an objection to his credit, and not to his competency. He had no pecuniary interest in the event of the suit, and was therefore competent. *Spring v. Lovett*, 11 Pick. 417.

It was then contended, that there was no proof of delivery of the indorsed note by the father to the plaintiff, so as to enable her to sue as indorsee. It is no doubt true, that if the holder of a note simply makes an indorsement upon it, directing it to be paid to a third person, and retains it in his own possession or power, no interest vests in the indorsee. But a constructive delivery is sufficient; any act which puts it into the power or under the control of the indorsee. Even in case of the sale of goods, deposited in the hands of a third person, a

contract of sale, with an order to the depository to deliver them to the vendee, is a good constructive delivery.

In this case, the note was in the keeping of Mr. Williams, as the attorney of the promisee, and he was then his agent. But when Richardson, the promisee, negotiated the note to his daughter, and left it in Mr. Williams's custody for her use, he thereby consented to hold it for her, and became her agent, and brought an action upon it in her name, which she sanctioned by original order or subsequent ratification. This is abundant proof of actual transfer and constructive delivery, and makes her indorsee and holder of the note, although she never saw it. In the case of *Hedge v. Drew*, 12 Pick. 141, it was held, even in case of a deed, that a delivery by the father to a third person, for the use of his daughter, and her subsequent assent to it, was a good delivery to pass real estate.

It was stated in the argument for the defendant, that this note was indorsed without recourse, from which it was contended that the indorsee was to be regarded as the agent of the indorser, to collect it for his use. This, if it was so indorsed, is not a just conclusion. Such an indorsement transfers the whole interest, and the clause, "without recourse," merely rebuts the indorser's liability to the indorsee and subsequent holders. It has indeed been sometimes considered that this clause, with other circumstances, tends to show that the note was not indorsed for value, and in the usual course of business, giving the indorsee an absolute title, without set-off, or such other defence as the maker might have, if sued by the promisee. But in the present case, if the defendant had any such set-off, or other defence, as against the promisee, it would be fully open to him, not only because the note was indorsed without recourse, but because it was indorsed after it had been long overdue.

Exceptions overruled.

ASA HODGES vs. GEORGE HODGES.

A plaintiff may recover damages for the *continuance* of a nuisance, viz. a dam across a stream that passes through his land, though his declaration alleges that the stream has long been obstructed by means of a dam erected by the defendant.

A. and B. submitted to arbitrators, by a rule under Rev. Sts. c. 114, § 2, a demand made by A. on B. for a certain sum 'for injury said A. has sustained by reason of the flowing of his land by said B., by means of a dam maintained by him,' and also all demands between the parties: The award of the arbitrators was, 'each party shall pay one half of all the expenses arising from this rule, and they shall settle even all accounts and demands previous to the date' of the award: This award was accepted: A. afterwards brought an action against B. to recover damages caused by the same dam, and B. defended on the ground that the award was a bar to the action: *Held*, that the claim for damages, made by A. in the submission, was only for the flowing of his land up to the date of the submission, and not for gross damages, including future injury by the continuance of the dam; but that, as the award was accepted, it was a bar to A.'s claim for damages, up to the date thereof, but was not a bar to his claim for damages afterwards sustained. *Held* also, that the testimony of the arbitrators was admissible to show that they allowed damages to A. for the injury caused to him by the dam, and set them off against the demands of B. on him.

An action at common law lies for damages caused by flowing land by a dam that has been connected with a mill, if the defendant has abandoned the intention of again using the dam and water as a mill power; and the jury may decide whether he has abandoned such intention.

Though a jury, on the trial of an action for the continuance of a nuisance, give damages for a little longer time than they ought, yet a new trial will not be ordered, for this cause, if the plaintiff remit such part of the damages as is thus wrongly assessed by the jury.

TRESPASS upon the case. The declaration alleged, that the plaintiff "on the 20th of May 1732, and long before and ever since, was seized in fee and possessed of a parcel of meadow land in Norton bounded on the easterly side by a highway," [setting out all the boundaries] "through which meadow run an ancient brook; that the water from said brook, from the time whereof the memory of man runneth not to the contrary, into the natural channel was wont to run; yet that said George, on the said 20th of May 1832, and long before and continually afterwards, up to the day of the date of the plaintiff's writ, the ancient course of the water of said brook hath obstructed by means of the making of a bar or dam across said ancient course of the water of said brook, to turn the same into a certain sluice, on the northerly side of said brook, erected by the said

George ; by reason of which obstruction, the water of said brook overflowed the said meadow land, both summer and winter, all the time aforesaid, and thereby spoiled the same, injured the quality and reduced the quantity of grass," &c.

The trial was before the chief justice, who made the following report thereof : The evidence tended to show that the plaintiff was the owner of the meadow described, by inheritance from his father ; that it was separated from a tract of meadow land owned by the defendant, and inherited from his father, by a road upon which was a bridge over a small brook ; that said brook constituted the natural outlet and drain of a tract of bog meadow, and flowed from the plaintiff's to the defendant's meadow ; that the defendant, and his father before him, have had a dam across the brook, below the road that divides the plaintiff's part of the meadow from the defendant's, by which the water has been raised and kept up during the winter only, for the purpose of carrying a wheel for the use of a fulling mill, trip hammer, &c. : That about 20 years ago, the defendant, with his father who has since deceased, were jointly in possession of the lower meadow, and of the dam and the works connected therewith : That about that time, the defendant, or his father, cut a small canal, beginning at the upper part of the meadow now owned by the defendant, near the road, at the side of said brook or outlet, and continuing it along the margin of said meadow, about 30 rods, to the defendant's shop below, where it was turned upon a water wheel, and used to carry a smith's bellows, &c. : That by a mill dam, separating it from the larger or winter pond, it was kept up and used as a water power in summer, when the larger pond was down : That below the road, and just below the upper end of said canal, sand and mud gradually accumulated, and that, at length, the brook took the direction of said canal, and all the water, when not high, has flowed down in the canal.

Whether there was any original channel or river bed, or whether the water originally spread over the meadow ; whether the defendant or his father placed any obstruction there, to turn the water into the canal, or whether the bank was formed there

naturally, by means of the earth washed down from the road ; whether, if the bank was placed there by design, it raised the water so as to cause it to flow back upon the plaintiff's land — were questions of fact which were left to the jury, upon the evidence.

The defendant, in addition to a general denial of liability, relied upon two distinct grounds. 1st. That the plaintiff's remedy was barred, and the whole case settled, by an award between the parties. 2d. That if the plaintiff had any remedy, it was upon the mill act, (Rev. Sts. c. 116,) and not an action upon the case for a nuisance.

As to the *first* ground, viz. the bar by an award, the defendant gave in evidence a submission entered into by himself and the plaintiff, on the 20th of August 1834, before a justice of the peace, upon a demand made of the defendant by the plaintiff of the sum of "six hundred dollars for the injury the said Asa has sustained by reason of the flowing of his land in Norton, done by the said George, by means of a dam maintained by him across a brook or river in said Norton." The agreement was "to submit the said demand made by the said Asa against the said George, and all other demands between the parties, to the determination of" [three men named,] "the report of whom, or the major part of whom, being made, as soon as may be, to any court of common pleas to be held in and for said county of Bristol, judgment thereon to be final," &c. The award of the referees was, "that each party shall pay one half of all the expenses arising from this rule, and that they shall settle even all accounts and demands previous to this date. October 1st. 1834." This award was returned and accepted.

The jury were instructed, that this submission and award were a bar to any claim of damages for originally erecting the dam, and also for the continuance of the same to the time of the submission ; but that, unless the arbitrators had wholly negatived the plaintiff's claim for any damage for flowing, the award was not a bar to a claim for damages for the continuance of the nuisance. As the award was equivocal, in this respect, the testimony of two of the referees was admitted, which tended to

show that they did find some damage for the plaintiff, but set it off against other demands on the other side. To the admission of this testimony the defendant excepted.

It was also objected by the defendant, that if in other respects the plaintiff would be entitled to recover on the evidence, yet he could not recover in this action, because the declaration was so framed as to charge the erection of a nuisance, and that it did not charge a technical continuance of a nuisance. But the objection was overruled, and the jury were instructed, that if in other respects the plaintiff had made out a case for the continuance of a nuisance, he might, on this declaration, recover damages for such continuance from the day of the aforesaid submission to the time of the commencement of this action. To this instruction the defendant excepted.

Upon the *second* ground, viz., that the plaintiff's remedy, if he had any, was upon the mill act, there was evidence tending to show that, for a few years last past, the mill wheel which used to be carried by means of the summer pond and the water conveyed by the canal in question, had ceased to be used ; that the water of the summer pond was not separately kept up, but first intermixed with the water of the winter pond on the larger dam ; and that the only mill wheel, that was used, was the wheel driven by the winter pond.

The jury were instructed, that if the canal was cut, and the dam, bank or obstruction, was erected near the head of it, to turn the water into it, and then conduct it to the defendant's shop for the purpose of driving any machinery of the kind mentioned, it was a water mill, under the protection of the mill act ; but if, at any time before this action was commenced, it had ceased to be used for mill purposes ; and if the defendant had given up the intention of again using it as a separate mill power, and abandoned it, then it had ceased to be a mill dam and to be under the protection of the mill act ; and that if the plaintiff was entitled to any remedy, it was by this action at law, and not upon the mill act. To this instruction the defendant excepted.

The jury found a verdict for the plaintiff, for the continuance of the nuisance from the 20th of August 1834, the date of the

submission, to the 19th of May 1838, the day of the commencement of this action.

Verdict to be set aside, and a new trial awarded, if any of the foregoing rulings were wrong.

Pratt, for the defendant. The declaration is not properly adapted to the case proved, and the plaintiff cannot recover thereon for the *continuance* of a nuisance. Angell on Water-courses, (1st ed.) 89. 2 Chit. Pl. (6th Amer. ed.) 770, & note. *Staple v. Spring*, 10 Mass. 74. *Commonwealth v. Gowen*, 7 Mass. 378. *Johnson v. Long*, 1 Ld. Raym. 370 : 3 ib. 259. Com. Dig. Action upon the case for a Nuisance, B. As the defendant and his father erected the dam, the defendant is not liable to an action for continuing it, until after notice given to him to remove it. 1 Chit. Pl. (6th Amer. ed.) 77, 423. Jenk. 260. *Penruddock's case*, 5 Co. 101. *Tomlin v. Fuller*, 1 Vent. 48 : 1 Mod. 27.

The award was a bar to the whole case ; and parol evidence to explain the award should not have been admitted. *Homes v. Aery*, 12 Mass. 134. *Newburyport Ins. Co. v. Oliver*, 8 Mass. 408. *Smith v. Whiting*, 11 Mass. 445. *Webster v. Lee*, 5 Mass. 337. *Wheeler v. Van Houten*, 12 Johns. 311. *Buckland v. Conway*, 16 Mass. 396. *Ward v. Gould*, 5 Pick. 291. *Newland v. Douglass*, 2 Johns. 62. *Irvine v. Elton*, 6 East, 54. *Smith v. Johnson*, 15 East, 213.

The judge ruled that the award was a bar only to the recovery of damages up to the date of the submission ; and the jury have given damages according to the ruling. Yet the arbitrators gave damages (if any) up to the date of the award ; and as the award was accepted, the plaintiff has received damages up to the same date. So that the defendant, on this ruling, is charged for damages, in part, for which he has once *settled*, conformably to the terms of the award.

The plaintiff's remedy, if any, was under the mill act. *Stowell v. Flagg*, 11 Mass. 364. *Wolcott Woollen Manuf. Co. v. Upham*, 5 Pick. 292. Abandonment was a question of law, and should not have been left to the jury. The plaintiff lost nothing by a disuse of his works for a short time ; *Williams v.*

Nelson, and *French v. Braintree Manuf. Co.* 23 Pick. 141, 220 ; nor by changing them. *Saunders v. Newman*, 1 Barn. & Ald. 261.

Coffin, for the plaintiff. The declaration does not aver that the defendant erected the dam ; and doubtless, if the plaintiff had proceeded for damages caused by its erection, he could not recover. But a party may recover for the continuance of a nuisance, even though he aver an erection and continuance also. *Berwick v. Cunden*, Cro. Eliz. 402. *Brent v. Haddon*, Cro. Jac. 555.

It can be "understood by the court," that the declaration is for a continuance of the dam, and not for its erection, and therefore, by Rev. Sts. c. 100, § 21, the plaintiff is entitled to his verdict.

As the submission was of all demands between the parties, it does not follow from the fact that the arbitrators gave damages to neither party, that they decided that the plaintiff had sustained no damages. They doubtless set off one party's claim against the claim of the other ; and the parol evidence was properly received in explanation of the award. Greenl. on Ev. §§ 282, 532. The arbitrators made no mistake, as in the case in 2 Johns. 62, nor did the testimony given by them tend to give a legal construction to their award, as was attempted in 5 Pick. 291.

The jury having found that the defendant had abandoned his mill right, the plaintiff has no remedy on the mill act. *French v. Braintree Manuf. Co.* 23 Pick. 216. And he will remit the damages which the jury gave for the time between the date of the submission and of the award.

HUBBARD, J. The defendant objects to the declaration in this case, that it does not charge a technical continuance of a nuisance, but is merely a count for the erection of a nuisance. There is a difference, and oftentimes a material one, between a count for erecting and creating a nuisance, and a count for the continuance of such nuisance. But these counts may be and often are joined in the same writ.

The declaration in the present action is not drawn with peculiar skill ; but the same critical astuteness is not now applied to the detection of technical mistakes and variances in [leadings as

in former years, and our statutes have provided that writs, declarations and other proceedings, shall not be abated, arrested, quashed or reversed, for any circumstantial errors or mistakes, when the person and case may be rightly understood by the court. Rev. Sts. c. 100, § 21. Now the declaration in this case avers that on the 20th day of May, and long before, and continually afterwards, up to the day of the date of the writ, the defendant had obstructed the brook, by means of a dam erected by him ; by reason of which obstruction the water overflowed the plaintiff's meadow, both summer and winter, all the time aforesaid, and thereby spoiled the same during the time aforesaid, &c.

In an action for erecting a nuisance, though the exact time of erection need not be averred in the declaration, yet the fact of the erection, on some given time, must be distinctly charged ; but in an action for continuing a nuisance, the time of its erection or creation need not be set forth ; as was determined long ago in the action of *Westbourne v. Mordant*, Cro. Eliz. 191, a case strongly resembling the present ; and we think the injury, here complained of, is in fact for continuing the obstruction, and not for creating it : And we are of opinion that the action may be supported upon this declaration.

The defendant also contended that the award was a bar to the action. If this had been a suit for the erection of the nuisance, the award would be a good bar, because injuries to the land, preceding the submission, are embraced in it, by its terms. But we are satisfied, on looking at the submission and award, that a claim for damages was only made for flowing the demandant's meadow up to the time of the submission, and not for gross damages, including any future injury for the further and lasting continuance of the nuisance, subsequent to the period of making the award. And we are also of opinion, that under the authority of *Webster v. Lee*, 5 Mass. 334, parol evidence was properly admitted to show that the present claim was not submitted to the referees for their examination and award. See also *Ravee v. Farmer*, 4 T. R. 146. *Seddon v. Tutop*, 6 T. R. 607. *Bailey v. Lechmere*, 1 Esp. R. 377. *Parker v. Thompson*, 3 Pick 429.

It has been also urged by the defendant, that if the plaintiff has any claim for damages, his remedy is under the mill act. We think it was very properly submitted to the jury, whether the defendant had abandoned the intention of again using the dam and sluice way as a separate mill power, independent of the main dam: And they having found that he had abandoned such use of the same, and the defendant not having requested the evidence, upon which the question of law stated by him might properly arise, to be reported for our consideration, we think the plaintiff cannot be compelled to resort to the mill act for redress. *French v. Braintree Manuf. Co.* 23 Pick. 216.

In regard to the time for which the jury calculated the damages, viz. from the 20th of August, 1834, the date of the submission, to the 19th of May 1838, the commencement of this action, it is evidently too long and is founded on a mistake in taking the date of the submission for a starting point, instead of the date of the award, Oct. 1st 1834. But it seems unnecessary to set aside the verdict for the correction of this trifling mistake; and the plaintiff, on remitting one dollar of his damages, can have judgment for the difference.

THE EAGLE BANK AT PROVIDENCE vs. EPHRAIM A. HATHAWAY.

Where there are several successive indorsers of a bill of exchange or promissory note — whether the indorsements be upon actual negotiation for value, or for the purpose of collection only — the holder may send notice of its dishonor to his immediate indorser; and if that indorser, after receiving such notice, give seasonable notice to his immediate indorser, the latter is liable to his immediate indorsee, though he does not receive notice so soon as if it were transmitted to him by the holder, immediately upon the dishonor: And so of each successive indorser.

A bill of exchange was made payable at Philadelphia to A., or order, who resided in Providence, and he indorsed it, for valuable consideration, after acceptance, to a bank in Providence: This bank indorsed and transmitted the bill to a bank in New York for collection; which bank also indorsed and transmitted it, for collection, to a bank in Philadelphia: The latter bank caused the bill to be presented to the acceptor for payment, at maturity, and, on payment being refused, caused written notices to be made out for all the parties to the bill, and seasonably sent those notices to the bank in New York; which bank seasonably sent notice of non-payment to the bank in Providence, and also enclosed to that bank the notice to

Eagle Bank v. Hathaway.

A., the first indorser : The bank in Providence immediately placed this notice to A. in the post office in that city. *Held*, that the notice to A. was reasonable and sufficient, and that he was liable to that bank on his indorsement.

ASSUMPSIT against the indorser of a bill of exchange. The bill was drawn at Providence (R. I.) Feb. 1st 1837, by S. Arnold & Co. upon Williams, Haven & Co. of Philadelphia, for \$800, payable, at four months after date, to the defendant or his order, and by him indorsed, and accepted by the drawees.

At the trial before the chief justice, it appeared that the bill was discounted by the plaintiffs, indorsed by their cashier, S. S. Wardwell, and transmitted to the Bank of New York, in the city of New York ; that it was there indorsed by A. P. Halsey, cashier of that bank, and transmitted to the Bank of North America at Philadelphia.

On the day when the acceptance became due, which was June 3d, the second day of grace, (the 4th of June, the 3d day of grace, being Sunday,) it was duly presented, by a notary public employed by the Bank of North America, to the acceptors for payment, who stated that it would not be paid ; and thereupon he duly protested the same for non-payment. On the next day, the notary made out notices in writing, in due form, that said accepted bill had been presented for payment and was not paid, and that the holders looked to the party addressed for payment ; and addressed the notices, severally, to S. Arnold & Co. the drawers, to E. A. Hathaway, and to S. S. Wardwell, the indorsers, and enclosed all of them, with the bill, to " A. P. Halsey, Cashier, New York," and deposited them in the post office at Philadelphia. These notices and the bill were received by said Halsey, through the post office, on Monday June 5th, and on the same day, the notices were enclosed and addressed to " S. S. Wardwell, Cashier, Providence, R. I."

Said Wardwell testified, that on the 6th of June, he received the letter from Halsey, postmarked at New York, June 5th, containing the notices, and that he received the bill on the next day : That he had no recollection of sending the notice to the indorser, but that it was the invariable practice of the bank (the plaintiffs) to deliver all such notices on the day they are re-

ceived, in one or the other of the following modes ; either, 1st, at the residence or place of business of the person addressed, or, 2d, to him personally, or, 3d, to enclose the notice and direct it to the party, and put it into the post office ; and if the party had a box in the post office, to put it into his box.

This evidence of usage was objected to by the defendant's counsel, but was admitted.

Said Wardwell further testified that it was not his practice to keep any record of such notices given to the bank, and that he did not distinctly recollect the fact of receiving the aforesaid notice from the bank at New York ; but ascertained the fact, and the time of receiving it, from his business letters.

It was admitted that the defendant, on the 6th of June 1837, was a merchant resident in Providence.

The defendant took three grounds of defence : 1st. That the notice was not seasonably given ; that as the bill was protested on Saturday, June 3d, the notice from the notary should have been written and deposited in the post office on the same day : 2d. That the notice to the defendant should have been forwarded directly to him at Providence, and not intermediately to New York, whereby it was delayed, and the defendant therefore discharged : 3d. That the facts testified to by Wardwell were not competent and sufficient to prove notice to the defendant as indorser.

The two first objections were overruled. It was ruled that Wardwell's testimony was competent ; and it being agreed to refer to the whole court the question of its sufficiency, and the points of law in the case, a verdict was taken for the plaintiffs by consent.

Judgment to be rendered on the verdict, if the above rulings were right, and if the aforesaid evidence was sufficient to prove due notice to the defendant as indorser ; otherwise, the verdict to be set aside and the plaintiffs to become nonsuit.

Coffin, for the defendant.

Holmes, for the plaintiffs.

SHAW, C. J. Several exceptions were taken by the defendant, at the trial ; but the *only one* brought before the court in the

argument is, whether, under the circumstances, notice given to the defendant, through the post office, was sufficient to charge him as indorser.

We suppose it well settled by the usage and practice of merchants and bankers in the United States, that where bills and notes negotiable are indorsed and transmitted from one to another successively, whether it be upon actual negotiation for valuable consideration, or only for the purpose of collection, it is competent for the holder to send notice to his immediate indorser, and if each transmits notice after he himself has seasonably received it, the indorsers are severally liable, although the notice does not reach the earlier indorsers, quite so soon, as if it were transmitted to each indorser at once, by the party who is holder at the time of dishonor, or by the notary employed by such party.*

Then the question is, supposing this notice, thus duly and seasonably made out by the Philadelphia notary, addressed to the defendant, and enclosed to Mr. Wardwell, the cashier of the plaintiff bank, whether it was sufficient, if sealed and deposited by him in the post office of the same town where that bank was established.

It seems to be well settled by decided cases, that where the transaction, which is to be notified, takes place in the same town, in which the party to whom notice is to be given resides, such notice must be personal, or at his domicile or place of business. Bayley on Bills, (2d Amer. ed.) 277. *Davis v. Gowen*, 1 Appleton, 447. *Peirce v. Pendar*, (post. 352.) And it is equally well settled by similar authority, that when the party resides in another town, notice by the post office is sufficient. *Munn v. Baldwin*, 6 Mass. 316. So it has been held, that in such case notice by mail is so far conclusive, that it is sufficient, though the notice was in fact never received. *Shed v. Brett*, 1 Pick. 401. But the present case does not come strictly within either of these classes. The transaction to be notified did not occur in the same town; but Wardwell, from whom the notice was last forwarded, did live in the same town.

* See *Jackson v. Harth*, 1 Bailey, 482. *Carter v. Burleigh*, 9 N. Hamp. 559. *Farmer v. Rand*, 4 Shepley, 453. *Freeman's Bank v. Perkins*, 6 Shepley, 292. *Northern Bank v. Williams*, 8 Shepley, 217. 3 Kent Com. (3d ed.) 108. Story on Bills, § 294.

Were it an original question, it is far from certain that notice by the post office would not frequently reach an indorser as soon, and as certainly, as notice at his domicil. Perhaps in large commercial cities, where bankers, merchants, and active men of business usually send to the post office several times a day, notice by the post office would be as prompt as any other. In smaller communities, however, and places more sparsely settled, such notice might be likely to linger in the post office. But it is not a new question. A long course of judicial decisions, either following or governing the usage of merchants and men of business, has settled it. But it is thus settled by positive law, only so far as the cases are within it ; and the present is not. On the whole, as the transaction to be notified to the defendant took place in Philadelphia ; as notice to him by mail, either from there, or from New York, when the draft got back to the indorser there, would have been good ; as Wardwell was the conduit of conveyance, and not the party from whom the notice emanated ; as the defendant, if he were looking for notice of the dishonor of this bill of exchange, payable in Philadelphia, would naturally look to the post office for that notice ; we are of opinion that notice by the post office, under these circumstances, must be deemed good.

Judgment on the verdict.

THE FALL RIVER UNION BANK vs. ARTEMAS WILLARD.

Where one indorsed a bill of exchange, for the accommodation of the drawer, who negotiated it on an agreement, not assented to nor known by the indorser, that it should not be presented to the drawee for acceptance, until maturity, and it was accordingly first presented to the drawee at maturity, and then dishonored ; it was held that the indorser was not thereby discharged.

Where the holder of an indorsed bill of exchange, which is not accepted by the drawee, merely informs the drawee that he (the holder) has the bill, but does not actually present it to him for acceptance, and the drawee thereupon tells him that the bill will not be accepted nor paid, the indorser is not thereby discharged though no notice is given to him of the drawee's declarations.

THIS was an action, brought by a bank incorporated by the legislature of Rhode Island, and doing business at Tiverton.

near Fall River, against the indorser of a bill of exchange. The bill was drawn by an unincorporated company, called the Tiverton Print Works, by their agent, William Canedy, on Ruggles & Chace at Fall River, dated July 27th 1839, for \$ 1050 payable in six months. Trial before *Shaw*, C. J. who reported the case, as follows :

There was evidence tending to show that Ruggles & Chace constituted a firm, and had a house of trade at St. Louis, Missouri ; that they had dealings with the drawers of the bill ; that Chace, one of the firm, was at Fall River in the summer of 1839, though not in that town on the day the bill was drawn ; that he was at Fall River in January 1840, when the bill fell due, and, for aught that appeared, had remained in this part of the country in the mean time.

There was evidence tending to show that at the time of the date of the bill, the Tiverton Print Works (the drawers) and Ruggles & Chace had an open and unsettled account, on which there was supposed to be due to the drawers about \$ 1000 ; that a few days after, another bill was drawn by the said Print Works Company on Ruggles & Chace, upon a settlement, for the sum of \$ 912, which was accepted by them and paid at maturity.

It further appeared, that the day before the date of the bill in suit, said Canedy, the agent of the drawers, applied to the plaintiffs for a discount of a bill on Ruggles & Chace for \$ 1000, at six months, which the plaintiffs declined taking, because it had too long a time to run ; that Canedy then proposed to obtain a like discount on a draft of said Print Works Company upon Harrison & Co. of Baltimore, at four months, payable to the order of the drawers and indorsed by them, which the plaintiffs agreed to take. But the Print Works Company had not then received from Harrison & Co. an acceptance of such draft, and as Canedy was in urgent want of the money on that day, to pay off the workmen of the company, he proposed, for the purpose of obtaining it in advance of an accepted draft from Baltimore, to secure the \$ 1000 by pledging the draft on Ruggles & Chace for \$ 1050, now in suit ; but as Chace was out

of town, Canedy further proposed to procure an indorser on that draft, and offered the name of the defendant. This was acceded to by the plaintiffs, and the draft was indorsed by the defendant and deposited by Canedy with the plaintiffs, who advanced to him \$1000, upon an agreement that the draft, accepted by Harrison & Co. was to be obtained as soon as practicable, and deposited with the plaintiffs, and that when that was done, the present bill was to be given up. At the same time, it was agreed by Canedy and the plaintiffs, that the present draft was not to be presented for acceptance; but the precise terms of that agreement, the length of time the draft was to remain without being presented for acceptance — whether until the bill was at maturity, or otherwise, and whether this was known and assented to by the defendant — were questions submitted to the jury. There was evidence to show that the defendant knew that the bill was to be negotiated and deposited with the plaintiffs as a temporary security till the return of the accepted draft.

There was evidence tending to prove that the accepted draft from Baltimore was never received by the plaintiffs; that about a month after the time of this negotiation, the Tiverton Print Works failed, and have ever since been wholly insolvent; that the plaintiffs made no formal presentment of the bill to Ruggles & Chace for acceptance, until its maturity, on the 30th of January 1840, when it was presented for acceptance and payment, at the same time, by a notary public; that the drawees refused both to accept and to pay it, for want of funds; and that seasonable notice thereof was given to the defendant.

There was evidence from the deposition of Cromwell Chace, one of the drawees, tending to show that after a sufficient time had elapsed to receive an accepted draft from Baltimore, the plaintiffs' cashier met him (Chace) and applied to him to know how the account stood between Ruggles & Chace and the Print Works, and that the cashier then informed Chace that the plaintiffs had the draft on them, now in suit, and that he informed the cashier that it would not be accepted. The cashier testified that he had no recollection of what Chace deposed, and that it

was not intended to present the bill for acceptance until its maturity.

The jury were instructed, that if the bill was discounted by the plaintiffs at the request of Canedy, as agent for the Tiverton Print Works and was indorsed by the defendant, for the accommodation of the drawers ; and if at the time of the negotiation to the plaintiffs, it was agreed between Canedy and them that the bill should not be presented to the drawees for acceptance, then, unless such agreement was made with the knowledge and assent of the defendant, it would discharge him, because it would alter and extend his responsibility.

The jury were also instructed, that if the bill was indorsed by the defendant for the accommodation of the drawers, by the request of Canedy, their agent, and deposited with the plaintiffs as temporary collateral security for the draft on Harrison & Co., to be accepted by them and returned, and until such acceptance could be procured by Canedy, after a sufficient and ample time had elapsed to obtain such acceptance, in the usual course of business, it did not come ; then it was the duty of the plaintiffs to present the bill, now in suit, to the drawees for acceptance, and if acceptance were refused, to give reasonable notice thereof to the defendant ; and that if they failed so to do, it was a default and want of due diligence on the part of the plaintiffs, which discharged the defendant, unless he had consented that the bill should not be presented for acceptance, until its maturity.

In reference to the testimony of Chace and the plaintiffs' cashier, the jury were instructed, that if the bill was presented for acceptance before its maturity, or if the drawees were informed by the cashier that the plaintiffs had such a draft on them, and they thereupon informed the cashier that they should not accept nor pay it, and if no notice thereof was given to the indorser, (the defendant,) he was discharged.

The jury found a verdict for the defendant, which was to be set aside, and a new trial to be granted, if the foregoing instructions, or either of them, were wrong.

Eliot, for the plaintiffs.

Coffin, for the defendant.

HUBBARD, J. It is a well established principle of the law regulating bills of exchange, that the holder of a bill, payable at a certain time after date, need not present it for acceptance prior to the day of payment. And though it is usual and safe so to do, as he thereby strengthens his security, or, in case of non-acceptance, acquires an immediate right to call on the other parties to the bill, yet he is under no legal obligation to do it, nor can the omission be taken advantage of by the drawer or indorsers. *Goodall v. Dolley*, 1 T. R. 712. Chit. on Bills, Part I. c. 5. 3 Kent Com. (4th ed.) 82. *O'Keefe v. Dunn*, 6 Taunt. 305. S. C. 1 Marsh. 613.

The question in this case, as to the first instruction, is, whether the circumstances, under which the plaintiffs took the bill, imposed a duty on them not required in common cases. The facts alleged, upon which the instruction is founded, are these : The bill was drawn by the agent of the Tiverton Print Works on Ruggles & Chace, and indorsed by the defendant for the accommodation of the Print Works ; and the same was discounted by the plaintiffs with the understanding on their part, that the drawer might substitute the acceptance of Harrison & Co. of Baltimore for the sum advanced, when such acceptance should be received. And at the same time, it was agreed that the draft was not to be presented for acceptance. The instruction was, that if such agreement, not to present the draft for acceptance, was made without the knowledge and assent of the indorser, it would discharge him, because it would alter and extend his responsibility.

The jury, by their verdict, it may be presumed, negatived any such knowledge on the part of the defendant. It is not to be understood by this instruction, that the draft was not to be presented, at any time, to the drawees for their acceptance — that is, waiving any demand upon them ; but that no presentment should be made prior to the time of the maturity of the bill. The holding of this bill as a substitute for another, as value was paid for this, has no effect upon the plaintiffs' right. *Bachelor v. Priest*, 12 Pick. 399. And it is very clear that if no such agreement, in respect to keeping back the bill, had

been made, the mere fact of the non-presentment of the bill, before the day of payment, would not avail the defendant as a defence against his liability. Shall then the agreeing not to present it vitiate the claim of the plaintiffs? It may here be stated, that the law, as regards accommodation drawers and indorsers, and *bonâ fide* holders, is the same as between drawers and indorsers for value, and *bonâ fide* holders; although the holder knows that the bill is an accommodation bill. *Fentum v. Pocock*, 5 Taunt. 192. [Story on Bills, § 191.] If it were not so, the end for which such bills are made would be defeated; the object being to give them the same character as to value, credit and negotiability, as a bill drawn in the ordinary transactions of business.

It may be argued in a case like the present, that by such an agreement not to present the bill for acceptance, the defendant may have been injured; as the drawees might have accepted the bill, if early presented; or if acceptance was refused and notice of the same was duly given to the indorser, he might have paid the bill and taken measures to secure himself against the drawer. This is true. The same objection, however, might be made, with equal force, in a case where no such agreement existed, and where the holder made no demand upon the drawee till the day of payment. But in such case, there being no duty existing on the part of the holder to present, the defendant would be without redress. So here, we think the agreement of the plaintiffs not to do what in law they were under no obligation to do, cannot affect the rights of the plaintiffs against the defendant; and though a loss may have been sustained by the defendant, by reason of the non-presentment before the day of payment, yet it is *damnum absque injuriâ*. It would be introducing a new distinction in the law of bills of exchange in respect to *bonâ fide* holders of accommodation bills, in giving accommodation drawers and indorsers the character of sureties; which might work much practical inconvenience. If the accommodation indorser chooses to impose a condition upon his indorsement, which shall affect future *bonâ fide* holders of the bill, he may do it at the time of making his indorsement, and in

such manner, that the *bonâ fide* holder shall be apprized of it and be bound by it. And if not, then he stands in the same situation as to the *bonâ fide* holder, as any other indorser, with the same rights, and subject to the same liabilities. The agreement, in the present case, was one of mere convenience as between the drawer and holder, not affecting the rights of third parties ; and the legal responsibility of the indorser, therefore, not being altered or extended by the agreement, we are of opinion that the instruction in this respect was erroneous.

The second instruction, coming directly within the reasoning which applies to the first, it is not necessary to state the facts which gave occasion to it.

In regard to the third instruction, it is very clear that if the bill was presented for acceptance, and the same was refused, it was the duty of the holder to give due notice to those parties whom he intended to charge. But the question here is, whether the facts stated constitute such a presentment of the bill as to discharge the defendant for want of notice.

The evidence which was introduced tended to show that the cashier of the Fall River Union Bank (the plaintiffs in this suit) met Chace, one of the house upon which the bill was drawn, and informed him that the bank had the draft, (now in suit,) upon which Chace told the cashier that they should not accept or pay it. And the instruction to the jury was, that if no notice thereof was given to the indorser, he was discharged. Waiving the question whether the cashier was agent for the plaintiffs for the purpose of presenting the draft for acceptance, or not, we are of opinion that this was not a due presentment of the bill for acceptance. The term presentment imports, not a mere notice of the existence of a draft which the party has in his possession, but the exhibiting of it to the person on whom it is drawn ; that he may see the same, and examine his accounts or correspondence, and judge what he shall do ; whether he shall accept the draft, or not. Here there appears to have been nothing more than a casual meeting of the parties, and the conversation on the subject of the draft ensued. If this had been communicated, it would have created no obligation on the part of the indorser

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to make present payment, and consequently such conversation imposed no present duty on the holders, as to the other parties to the bill. With this view of the case we are not satisfied with the instruction given to the jury. To confirm it, would tend to introduce a looseness of practice on the subject of presenting bills for acceptance, which will lead to disputes and difficulties greater than now exist.

Verdict set aside, and a new trial granted.

MARCUS DAGGETT vs. SALOME SHAW.

A grantor, who conveys land with warranty to A., bounding him on a certain line, and then conveys land to B. with warranty, bounding him on A.'s line, is a competent witness, in a suit between A. and B., to testify as to the situation of the monuments on their dividing line, at the time of his conveyances, although those monuments do not exist at the time when he testifies.

The declaration of a person, while he was in possession of land, claiming it as owner, that his line extended to a certain boundary which he pointed out when he made the declaration, is admissible in evidence, after his decease, on a trial of a question concerning the boundary line of the same tract of land.

WRIT of entry to recover a small parcel of land in Attleborough. At the trial, before *Dewey*, J. the sole question respected the boundary line between the lands of the parties to the suit. The evidence in the case was voluminous ; but the only facts, which need be prefixed to the opinion of the court, were these :

Two contiguous lots of land were formerly owned by Andrew Starkey and Thomas Starkey, sen. ; the northerly lot being owned by said Andrew, and the southerly by said Thomas. Upon the decease of said Andrew, certain portions of his said lot were set off to Mercy Everett and Amos Starkey, two of his children, and the title to these portions vested in Thomas Starkey, jr. on or before the 8th of October 1805. The land, thus set off, and which vested in Thomas Starkey, jr. lay on both sides of the line which was in dispute in this action. Said Thomas, jr. conveyed that part of the aforesaid land, which lay south of said line, to Elisha Morse, jr., and subse-

quently conveyed the northerly part of said land to Joab Daggett, bounding him southerly on said Morse. When said Thomas conveyed to Morse, he ran a new line, beginning on a river, at a stake, "a former bound of Amos Starkey land," and thence running, by a certain course, in a westerly direction, to an agreed point on a road. The question therefore was, where was the stake, the "former bound of Amos Starkey land," as, that being found, the other extremity of the line, on the road, being agreed, the line in controversy could thereby be determined.

The demandant and the tenant both derived title to the land in dispute through Joab Daggett.

The jury returned a verdict for the tenant, and the demandant moved for a new trial, on exceptions to the rulings of the judge at the trial.

The questions of law, which were raised at the trial, and the rulings of the presiding judge thereon, fully appear in the opinion of the court.

Dexter, for the demandant.

Coffin, for the tenant.

HUBBARD, J. The principal question in this case related to the true location of the north line of the land conveyed by Thomas Starkey to Elisha Morse, jr. it being conceded that the land of the demandant extends to the north line of the Morse lot. The demandant, among other evidence to establish his line, introduced the deed of Starkey to Morse. The tenant, on her part, called the said Thomas Starkey as a witness, to whom the demandant objected as incompetent, because he was the grantor of the land to Morse, and also of the adjacent land northerly, by a conveyance to Joab Daggett.

The court held that it was not competent for the tenant to introduce the evidence of Thomas Starkey, or any other parol evidence, to vary or contradict the deed from Starkey to Morse; but that if a part of the description of the boundaries, as given in the deed, was by reference to monuments, it was competent for the parties to introduce evidence, not contradictory to the deed, to locate such monuments and to testify as to their existence at

the time of the execution of said deed ; and that for this purpose Thomas Starkey was a competent witness, notwithstanding he was the grantor, as stated above.

The objection to the competency of Starkey's testimony, from the fact of his being the grantor of the adjacent land, has not been urged in the argument. And we think the objection could not be maintained ; for the witness is not shown to be interested. The fact of being grantor, up to a certain line, to one grantee, and then granting up to the same line to a second grantee, though with warranty, will not make him interested in the question of locating the line ; because, wherever the line is fixed, the second grantee will come to it, without reference to the covenants in his deed, whether it lessens or enlarges the quantity of his land.

But another objection has been raised to the admission of his testimony, grounded upon the fact, as assumed on the argument to be correct, that at the time of making the deed by him, no monument of stake and stones existed, but was then erected ; and at the time of his testifying, such monument had long since disappeared ; and therefore his testimony would in fact amount to nothing more than parol evidence as to where the line was, and not evidence pointing out monuments to which the deed will apply, and is introduced to give a construction to the deed, and consequently falls within the exception, that parol evidence shall not be admitted to vary or control a written contract.

This objection, though ingenious, we think is not tenable, and amounts to no more than an argument against the credibility of the testimony, and not against its competency. The witness is called upon to testify in what place he put down a stake as one of the boundaries of the land at the time of making his deed, which stake is now gone. The stake is called for by the deed ; and testimony as to where it actually stood does not go to vary or control the deed. Monuments are always the subjects of proof, and necessarily so ; and when removed, testimony is admissible to show their location. A witness may identify the place by certain local objects within his recollection, or by other facts and circumstances, by which he is able to fix the spot ; and

such testimony may be weighty or slight, according to the facts stated by him, which go to fix his recollection, and is proper for the consideration of a jury, who are called upon to settle the disputed fact.

The tenant also called Lucas Daggett, brother of the demandant, and son of Joab Daggett, and proposed to show by him that Joab Daggett, while he owned and occupied the Amos Starkey lot, pointed out to the witness a certain ditch as the northern boundary of said lot at the north east corner ; the deed from the heirs of Amos Starkey to Joab Daggett being in the case. The demandant objected to the competency of this evidence ; but the testimony was admitted and the witness testified that the said Joab Daggett pointed out to him the said ditch as the boundary of his lot.

The argument of the demandant's counsel is, that this is hearsay testimony ; and it is also further pressed upon the court, that the deceased person was interested to locate the line in dispute between the parties, as it is now claimed to run by the tenant ; and that for this cause, likewise, the testimony should be rejected.

It is undoubtedly true, as an established principle of the law of evidence, that hearsay testimony cannot be received ; and the wisdom of the principle is confirmed by the uniformity of the decisions in various courts and in different countries, which enforce it ; but, like very many general rules, it is not without its exceptions. One of these is traditional evidence or hearsay testimony of ancient witnesses respecting boundaries. In regard to this exception, many authorities have been cited by the counsel for the demandant, to prove that these declarations are only to be received as admissions of a party in possession, when made against his interest. But we think the rule, as it has been practised upon in this Commonwealth, is not so restricted ; and that the declarations of ancient persons, made while in possession of land owned by them, pointing out their boundaries on the land itself, and who are deceased at the time of the trial, are admissible in evidence, where nothing appears to show that they were interested to misrepresent in thus pointing out their boundaries ,

and it need not appear affirmatively that the declarations were made in restriction of, or against, their own rights. And for cases in which the general question has arisen, see 3 Dane Ab. 397. *Van Deusen v. Turner*, 12 Pick. 532. *Abington v. North Bridgewater*, 23 Pick. 170. And we think the law is well expressed, as stated by McLean, J. in giving the opinion of the court in *Boardman v. Reed*, 6 Pet. 341: "That boundaries may be proved by hearsay testimony, is a rule well settled, and the necessity or propriety of which is not now questioned. Some difference of opinion may exist as to the application of this rule, but there can be none as to its legal force. Land marks are frequently formed of perishable materials, which pass away with the generation in which they were made. By the improvement of the country, and from other causes, they are often destroyed. It is therefore important, in many cases, that hearsay or reputation should be received to establish ancient boundaries."

So in Pennsylvania, in the case of *Caufman v. Congregation of Cedar Spring*, 6 Binn. 62, Tilghman, C. J. says, "where boundary is the subject, what has been said by a deceased person is received as evidence. It forms an exception to the general rule." So in North Carolina. *Den v. Herring*, 3 Dev. 342. So in Connecticut, Chief Justice Swift, in his Digest, (ed. of 1822,) vol. I. p. 766, says, "in this State, the declarations of old people respecting the ancient bounds or monuments between the lands of individual proprietors, who were acquainted with them, have constantly been admitted in evidence." See also 2 Phil. Ev. (4th Amer. ed.) 628, note 477, where the cases are collected. Also the note of Professor Greenleaf, in his valuable treatise on the Law of Evidence, p. 171.

If the fact of interest in Joab Daggett to establish the line appeared in this case, the testimony of Lucas Daggett ought to be rejected. But not only the fact is not made out to the satisfaction of the court, in the examination of the deeds and plans, but on the other hand the objection at the trial, as appears by the report of the case, was, that Joab Daggett had no such interest in the matter of boundary of the premises as would authorize the

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admission of this evidence. It cannot therefore now be argued, with the hope of success, that Joab Daggett was so interested in the question of this boundary as to exclude his declarations on that ground.

We consider the evidence, which was admitted on the trial, to have been this : The testimony of a witness to the declaration of an ancient man made prior to the suit, and who was deceased at the time of the trial, being in possession of the land and stating the extent and limits of his occupation, and pointing out, on the premises, at the same time, the bounds and monuments which marked and defined a portion of the estate. And for the reasons before given, we think the testimony was admissible, as being in accordance with the practice in the courts of this Commonwealth.

Judgment on the verdict.

THOMAS COFFIN vs. PETER F. EWER & another.

A judgment debtor, who is arrested on execution, and voluntarily permitted by the officer to escape, and is afterwards arrested by the officer and committed to jail on the same execution, cannot maintain a writ of *audita querela* against the officer to recover damages for the false imprisonment.

WRIT of *audita querela* against Peter F. Ewer and Uriah Gardner. The declaration alleged that said Ewer recovered judgment against the plaintiff (Coffin) and two others, at the court of common pleas in Bristol county, December 1838, for \$782.52 damages, and for costs of suit, on which judgment an alias execution issued, July 2d 1839, in due form of law, and, on the 14th of August following, was put into the hands of said Gardner, then a deputy of the sheriff of Nantucket, for service ; that said Gardner, on the day last mentioned, did arrest, take and imprison the plaintiff, by virtue of said execution, and on the same day, then having the plaintiff in his custody, so as aforesaid, at Nantucket, voluntarily permitted the plaintiff to escape and go at large ; whereby the plaintiff did then and there escape and go at large ; that the said Gardner, thereafter, on

the 15th of said August, while the plaintiff was so at large as aforesaid, did again arrest, take and imprison the plaintiff, avowedly by virtue of said execution, and, under color and pretence of the authority of said execution, did beat, wound and ill treat the plaintiff, and him unlawfully and against his will, and without any legal warrant or authority, or any justifiable or reasonable cause, did imprison, and detain so imprisoned, from the said 15th of August 1839, to the day of the date of this writ, viz., December 6th 1839; of which said imprisonment and detention, under color of said execution, said Ewer was well knowing, and consented thereto, and refused to deliver the plaintiff therefrom: Wherefore the plaintiff prayed that he might be delivered from said imprisonment, made under color and pretence of said execution, and that no further proceedings might be had thereon; that said Ewer might be barred from having any execution against the plaintiff, upon the judgment aforesaid; and that his damages, by reason of said beating, ill treatment and imprisonment, might be adjudged to him. *Ad damnum* \$2000.

The trial was had at the November term 1841, before *Dewey*, J. who ruled that this writ of *audita querela* was not the proper form of action to be instituted against Gardner, to recover damages for the illegal acts alleged in the declaration, and that although the allegations in the declaration should be proved, the action could not be maintained against him. The judge further ruled, that this was a proper form of action against Ewer, and that, upon sufficient and proper evidence, the plaintiff would be entitled to set aside the proceedings on the execution, and to recover damages; and that the action might properly proceed against him.

The plaintiff then introduced his evidence, for the purpose of charging Ewer; but the jury returned a general verdict for both defendants. It appeared, on the trial, that the plaintiff was committed to the jail in Nantucket, upon the execution aforesaid, on the 15th of August 1839, and that he was discharged therefrom on the 12th of December following—six days after the date of the writ in this action.

The plaintiff excepted to the ruling as to Gardner's liability in this form of action.

Eddy & Eliot, for the plaintiff. The writ of *audita querela* is in the nature of a bill in equity, and is not, technically, an action. *Lovejoy v. Webber*, 10 Mass. 103. 3 Bl. Com. 406. *Leake v. Daves*, March, 69. 2 Saund. 148, note (1.) *Waddington v. Vredenberg*, 2 Johns. Cas. 227. Ewer, therefore, was made a party, not because he was supposed to be liable to damages, but because he had such an interest as would require him to be made a party to a bill in equity.

Gardner is liable to the plaintiff, in this form of proceeding, on proof of the facts alleged against him. Mo. 57, pl. 163. *Rigeway's case*, 3 Co. 52 b. *Walker v. Alder*, Style, 117.

This process lies, although the plaintiff might maintain trespass, at his election. *Brackett v. Winslow*, 17 Mass. 158.

Coffin, contra.

DEWEY, J. The writ of *audita querela* is of a remedial nature, and is said to have been invented principally to relieve a party who has a good defence, but is too late to make it in the ordinary form of proceeding. 3 Bl. Com. 405. Com. Dig. Audita Querela, A. It is also said, that the practice of the courts, in granting summary relief on motion, in most cases proper for proceeding by *audita querela*, has almost rendered it useless and unnecessary in modern times. 2 Saund. 148 c, note. Such being the case, it is not strange that we find comparatively so little learning on the subject, in recent works, or meet with but few modern decisions on the appropriate office of this writ, or who are properly made parties to a suit of this nature. In Massachusetts, this form of proceeding still remains in practice, and has the direct sanction of legislative authority. Rev. Sts. c. 112. But though recognized by our statutes, as an existing legal remedy, we are left to look elsewhere for the cases in which it is an appropriate remedy, as well as for the rules of law as to parties.

From the nature of the writ, and its ordinary purpose, it indicates a proceeding in a case which has been the subject of a judicial decision, or judgment in a court of law, and where the defendant in the original suit will be unjustly deprived of his rights, if the judgment or execution (as the case may be,) is

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allowed to be treated as valid. It was, by common law, and is also by statute, a local action, when brought to set aside a judgment or vacate an execution ; being required to be brought in the same court in which the judgment was rendered ; thus resembling a proceeding by writ of *scire factas*. There is a provision for a bond to be given by the debtor, in case of release from imprisonment under the process, to the party defendant ; and this seems to assume, or strongly to indicate, that the person who is the defendant in this writ is none other than the creditor himself. And practically it will be found, almost without exception, that the writ of *audita querela* has been instituted by the judgment debtor against the creditor, and against him alone ; and this has been the usual form, where the party was actually imprisoned on execution. The cases in Massachusetts, so far as reported, are all between these parties exclusively. I am not aware of any reported case in the courts of any State in the Union, where the same is not the fact. The English cases are very few, if any can be found besides the single case reported in Mo. 57, where this process has been instituted against the officer who levied the execution.

We do not, however, find it necessary to express an opinion whether this process may not, under any circumstances, lie against the officer ; as, for instance, against an officer having the judgment debtor in his actual custody, and where the debtor seeks immediate relief from such custody, he not having been committed to prison. The present is not such a case. The declaration states a recovery of a judgment by Ewer, an execution issued thereon, a service of the execution by Gardner, the deputy sheriff, on the fourteenth day of August, by arrest of the plaintiff, and a commitment, on the next day, to the county jail. After the commitment, the party was in the custody, not of the deputy sheriff who served the execution, but of the jailer, and thus remained until after the 6th of December following, when he sued out the present writ of *audita querela*. It will be perceived that nearly four months had elapsed from the time of his commitment to jail. With his commitment, all the deputy sheriff's authority over him ceased, and he had neither the power of con-

tinuing the imprisonment, nor of discharging the debtor therefrom. Clearly therefore the proceeding by *audita querela*, in the present instance, against the officer, cannot have its foundation in the fact that the debtor was in the custody of the officer, and that the object of the process, as against him, was to obtain relief from an unlawful imprisonment. As respects the officer, the process cannot be sustained on this ground. It is, as respects him, to all purposes a mere action to recover damages for trespass and false imprisonment. The ordinary remedy for such grievance was open to the debtor, and there was no necessity of resorting to this peculiar process merely to obtain satisfaction for an illegal arrest and imprisonment. If, however, the law has given the party this additional remedy, we admit that the fact of his having another mode of redress would be of no moment, and the party might take his election which remedy he would pursue.

It seems to us, that in the absence of any direct authority resulting from adjudicated cases upon a state of facts like the present, we are to look at the objects and purposes of this peculiar process ; and believing its leading purposes are to set aside and annul a judgment improperly obtained through the fraud and deceit of the creditor ; or where the debtor had no opportunity to interpose matter relied on in avoidance ; or where an execution has been issued, and the object is to release a party from an illegal imprisonment on such execution ; we do not think it ought to be extended to embrace a mere case of damages against one who is not a party to the original suit, and does not hold or claim to hold the debtor in his custody, or under his control, at the time of suing out the *audita querela*.

The court are therefore of opinion, that upon the facts set forth in the declaration, and in the report of this case, Gardner the deputy sheriff was not properly joined as a party to this suit, and that the plaintiff is not, in this action, entitled to recover damages against him for the alleged illegal arrest and false imprisonment.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME JUDICIAL COURT
FOR THE
COUNTY OF NORFOLK, NOVEMBER TERM 1842, AT
DEDHAM.

PRESENT :

HON. LEMUEL SHAW, CHIEF JUSTICE.
HON. SAMUEL S. WILDE,
HON. CHARLES A. DEWEY, } JUSTICES.
HON. SAMUEL HUBBARD, }

LYDIA BRETT *vs.* DANIEL BRETT.

Where parties, who are residents of another State, are married there and reside there after marriage, and the husband there deserts the wife, and she afterwards removes into this State, and resides here five years, the desertion being continued during that time, she is not entitled to a divorce, under *St.* 1838, c. 126, although she and her husband lived together in this State a part of the time between the marriage and the desertion. The court has no jurisdiction of such a case.

LIBEL for a divorce from the bond of matrimony, under *St.* 1838, c. 126.

It was proved, at the hearing before *Dewey, J.* at the November term, 1841, that the parties resided in New Hampshire at the time of their marriage, and several years subsequently ; that they then removed to Bridgewater, in this Commonwealth, and after residing there five years, returned to New Hampshire, where they resided fifteen years ; that in 1829, while they were residing in New Hampshire, the respondent utterly deserted the libellant, and has ever since lived apart from her, without her consent ; and that the libellant removed into this Commonwealth, in 1831, and has resided here ever since.

The question, whether the libellant was entitled to a decree of divorce, was reserved for the consideration of the whole court.

DEWEY, J. The objection to granting the prayer of the libellant and decreeing a divorce from the bond of matrimony, under the provisions of St. 1838, c. 126, arises wholly upon the question, whether the court has jurisdiction over the parties and the case made out by the evidence.

The parties resided in New Hampshire, when they were married, and for fifteen years immediately preceding the wilful desertion now complained of ; and but for the fact, that they had, at a period earlier than fifteen years before the desertion by the husband, lived together, as husband and wife, in this Commonwealth, the case would fall within the restriction of the Rev. Sts. c. 76, § 9, that "no divorce shall be decreed for any cause, if the parties have never lived together, as husband and wife, in this State." But the parties having thus lived in this Commonwealth, at a former period, this statute provision, taken literally, does not exclude the jurisdiction of the court over this case. The question then arises, whether other provisions, and the general spirit and purpose indicated by our statutes, and the general principles of law applicable to our jurisdiction in relation to violations of the marriage contract, and granting divorces therefor, do not clearly forbid us to entertain jurisdiction of this case and grant a divorce for the cause alleged.

Had this been a libel for a divorce for the cause of adultery shown to have been committed while the parties resided in New Hampshire, clearly the libel could not have been sustained. *Hopkins v. Hopkins*, 3 Mass. 158. *Carter v. Carter*, 6 Mass. 263. The principle settled in these early cases is distinctly adopted in the Rev. Sts. c. 76, § 11, wherein it is enacted, that "no divorce shall be decreed for any cause, which shall have occurred in any other State or country, unless one of the parties was then living in this State."

Our laws of divorce, as administered, furnish full protection to married women continuing to reside in the Commonwealth, in cases where the parties have lived here as husband and wife,

and the husband goes abroad and commits an offence, or does an act, which by our laws will justify a divorce. Even the general law of domicil is so far modified, in reference to libels for divorces, that the domicil of the wife is held not to be affected by the actual removal of the husband from the Commonwealth, so as to oust this court of jurisdiction. *Harteau v. Harteau*, 14 Pick. 181.

But the original act of desertion of this libellant by her husband was in New Hampshire, when this was their domicil, their stated home, for fifteen years then next preceding. This being so, the only possible mode of avoiding the provision of the revised statutes, which forbids a divorce for any cause which shall have occurred in any other State, is the position, that inasmuch as more than five years have elapsed since the libellant came to reside in this State, and as the desertion of the husband has been continued during the whole term, it may properly be held that the cause of the divorce has its foundation wholly in the acts of the husband since the libellant came here to reside. We do not think this ground tenable. The husband did not desert his wife in Massachusetts. Their domicil was in New Hampshire, and he deserted her there. This desertion was not an act for which he was amenable to the courts of this State. It may or may not have been, by the laws of New Hampshire, such a violation of his marital duties, as would there subject him to a dissolution of the marriage. The removal of the wife to this State, subsequently to the desertion by the husband, could not give this court jurisdiction of a cause thus originating elsewhere.

While we would give full force and effect to *St.* 1838, c. 126, in cases of our own citizens, and for causes occurring within the Commonwealth, it is equally the imperative duty of the court to abstain from interfering with the marriage relations existing between persons having a foreign domicil, and from taking cognizance of an application for a dissolution of the bond of matrimony for causes occurring within another jurisdiction to which the parties are more properly amenable — they both re-

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siding within such other jurisdiction at the time of the happening of the alleged cause for a divorce.*

Libel dismissed.

E. Ames, for the libellant.

WILLIAM H. CARY vs. ALFRED DANIELS.

An action by a mill owner for an obstruction of the stream below his mill and close, whereby the water was prevented from passing off from the wheel of his mill, along said stream, in the usual course, and as of right it ought to pass, is an action respecting an easement on real estate, within the meaning of *St. 1840, c. 87, § 1*, and original and exclusive jurisdiction thereof belongs to the supreme judicial court.

So of an action by an owner of salt meadow, situate above a mill dam on a navigable stream, against the owner of such dam, for obstructing the natural ebb of the tide, and thereby injuring the grass on such meadow.

Where an action for obstructing a stream below the plaintiff's mill, or for obstructing, by a mill dam, the natural ebb of the tide over the plaintiff's salt meadow above such dam, is commenced in the court of common pleas, and sustained by that court, after objection taken by the defendant to its jurisdiction, and a verdict is returned for the plaintiff, and the defendant thereupon brings the case into the supreme judicial court by exceptions, where it is dismissed because the court below had no jurisdiction thereof, the defendant is entitled to costs.

TRESPASS upon the case. The plaintiff alleged, in his declaration, that he was the owner of a close and a water mill, and water privilege thereto appertaining, in Medway, on Charles River, and ought to have the uninterrupted use and occupation of said mill and privilege; but that the defendant had erected and continued a dam in and across said river, below said mill and close, thereby hindering the water of said river from flowing and passing off from the wheel of said mill, along said river in the usual course, and as of right it ought to have flowed and passed off, and causing the water of said river to flow back on said wheel, and to obstruct the operation of said mill, &c.

This action was commenced in the court of common pleas; and after a motion to dismiss it for want of jurisdiction had been

* By *St. 1843, c. 77*, the court are empowered to grant divorces for causes occurring out of the Commonwealth, if the libellant has resided five successive years within the Commonwealth, and did not remove into the Commonwealth for the purpose of procuring a divorce under the laws thereof.

overruled, a trial was had in that court, and a verdict was returned for the plaintiff. The defendant thereupon alleged divers exceptions to the ruling of the court, upon the trial, and to the instructions given to the jury. These exceptions were argued at the last November term. The defendant's counsel also raised the question, whether the court of common pleas had jurisdiction of the case; and as that point only was decided, neither the matters of exception, nor the arguments thereon, are here stated.

Hallett & B. R. Curtis, for the defendant. This was an action respecting an easement on real estate, and, by *St.* 1840, c. 87, this court had original and exclusive jurisdiction thereof. 3 Kent Com. (3d ed.) 434, 439. Civil Code of Louisiana, Book II. tit. 4, c. 2. Code (Civil) Napoleon, Art. 640. Domat, Book I. tit. 12, § 1, art. 5. Bract. 221. *Hawkins v. Shippam*, 7 Dowl. & Ryl. 783. *S. C.* 5 Barn. & Cres. 221.

Merrick & Wilkinson, for the plaintiff. In *Johnson v. Jordan*, 2 Met. 239, it is said that the right of an owner of land, through which a natural watercourse runs, to have it pass off without unreasonable obstruction, is inseparably annexed to the soil, and passes with it, "not as an easement, nor as an appurtenance but as parcel. Unity of possession and title in such land with the lands above it or below it does not extinguish or suspend it." *S. P.* Poph. 170. Latch, 153. Noy, 84. *W. Jon.* 145 146. *Hathorn v. Stinson*, 1 Fairf. 224. *Hazard v. Robinson*, 3 Mason, 272.

Curtis, in reply. It is true, that a natural easement, or what Domat (as before cited) calls a "natural service, and of absolute necessity," is not extinguished by unity of possession. But it is nevertheless a technical easement. There was no adjudication to the contrary in *Johnson v. Jordan*.

WILDE, J. This case comes before us on exceptions to the rulings and instructions to the jury by the presiding judge of the court of common pleas; and the first question to be decided is, whether that court had jurisdiction of the cause. By *St.* 1840, c. 87, § 1, the supreme judicial court has original and exclusive jurisdiction of "all actions respecting easements on real estate,

but not including complaints for flowing land." So that the question is, whether this is an action respecting an easement on real estate. The foundation of the action, as alleged in the writ, is the erection, by the defendant, of a dam in and across Charles River, below the mill and close of the plaintiff, whereby the water of said river had been prevented from flowing and passing off from the plaintiff's water wheel, along said river, in the usual course, and as of right it ought to have flowed and passed off, and thereby causing back water on the plaintiff's wheel.

At the trial, the defendant admitted the erection and continuance of the dam, and claimed a right thus to obstruct the watercourse, and to cause the water to flow back on the plaintiff's land and water wheel; and the principal question at the trial was, as to the validity of the claim. But this claim of an easement over the plaintiff's land does not affect the question of jurisdiction; for the defendant might or might not set up such claim, and thus would have the power to oust the court of its jurisdiction, whether the action should be brought in this court or in the court of common pleas. The question, therefore, whether this court hath exclusive jurisdiction of an action respecting an easement on real estate, must depend on the declaration in the writ, by which it must appear that such an easement is claimed, and that its validity is necessarily involved in the decision of the case. And that, we think, does appear by the declaration in the present case. The right claimed by the plaintiff is that of having the waters of Charles River flow over the land of another, below his land and mill, and at the place where the obstruction was erected, in its accustomed course, and free from all artificial obstruction; and this we consider as a claim of right to a natural easement. The right which a party has to the use of water flowing over his own land is undoubtedly identified with the realty, and is a real or corporeal hereditament, and not an easement; but the right of a party to have the water of a stream or watercourse flow to or from his lands or mill, over the land of another, is an incorporeal hereditament, and an easement, or a prædial service, as defined by the civil law. And it is immaterial whether the watercourse be natural

or artificial ; or whether the right is derived *ex jure naturæ*, or by grant or prescription. It seems, however, that the right to receive a flow of water, and transmit it over the land of another, although a natural easement, not beginning by grant or the assent of parties, may be claimed by prescription. Gale & Whatley on Easements, (Amer. ed.) 88. Woolrych's Law of Waters & Sewers, 118. *Saunders v. Newman*, 1 Barn. & Ald. 258. *Hazard v. Robinson*, 3 Mason, 277. 3 Kent Com. (3d ed.) 441. *Wright v. Williams*, 1 Mees. & Welsb. 77. Such a natural easement is not extinguished by unity of possession of the dominant and servient tenements. *Shury v. Piggot*, 3 Bulst. 339. *S. C.* Poph. 166. *W. Jon.* 145. *Latch*, 153. *Noy*, 84. It is not material, however, to the decision of the question of jurisdiction, to determine whether the plaintiff's claim is well founded or not. He certainly claims an easement over the land where the obstruction was erected, and the court of common pleas are not authorized to take cognizance of such a claim. The right claimed is as clearly the claim of an easement, as would be the claim to transmit the water from the plaintiff's mill through an artificial watercourse or canal over the servient tenement.

We are of opinion, therefore, that the court of common pleas had no jurisdiction of this case, and that it must be dismissed.

After this opinion was announced, the defendant's counsel moved for costs. *Wilkinson*, for the plaintiff, resisted the motion, and cited *Williams v. Blunt*, 2 Mass. 207. *Clark v. Rockwell*, 15 Mass. 221. *Osgood v. Thurston*, 23 Pick. 110. *Bank of Cumberland v. Willis*, 3 Sumner, 472, 474. 1 U. S. Digest, Costs, 53.

WILDE, J. The plaintiff's counsel object to the allowance of costs, and rely on the rule laid down in *Osgood v. Thurston*, 23 Pick. 110. The rule is there said to be, "that where the writ is bad on the face of it, and it is manifest that the court has no jurisdiction, so that the proceedings may be quashed or motion, no costs are allowed." However correct this rule may be, as applicable to a case where the want of jurisdiction is so manifest that the court would quash it *ex officio*, without plea or

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appearance, we are of opinion that it cannot be applied, without manifest injustice, to the present case, which depends, as to the question of jurisdiction, on the construction of a recent statute, which, in the opinion of the court of common pleas, sustained the jurisdiction of that court. And this construction, we understand, was given to the statute, on the objection of the defendant to the jurisdiction of that court. Judgment was rendered against the defendant, from which he could not be relieved, but by removing the case into this court, on exceptions, or by writ of error. Under these circumstances, we think it cannot be maintained, that the defendant is not entitled to costs, as the prevailing party. The rule, on which the plaintiff's counsel rely, is not of universal application to all cases where the court has not jurisdiction. It must be a clear case, where no judgment would be rendered, although the defendant should not appear. In *Thomas v. White*, 12 Mass. 370, costs were allowed, though the court had no jurisdiction; on the ground that the want of jurisdiction was not manifest on the face of the writ, but was ascertained by the defendant's plea, in which, on oyer, the condition of the bond declared on was set out. So in suits in equity, costs are generally allowed where bills are dismissed on demurrer for want of equity jurisdiction. It is therefore by no means universally true, that costs are not to be taxed for the defendant, where the suit fails for want of jurisdiction of the court over the subject matter of the suit.

In all cases where the want of jurisdiction does not manifestly and clearly appear on the face of the writ, and the question of jurisdiction, as in this case, is a fair subject of discussion, and for the decision of the court, there seems to be no reason why the defendant, if he prevails by the decision of the question in his favor, should not be entitled to costs. And for these reasons, we are of opinion that judgment for costs must be entered, in this case, for the defendant.*

* At the October term 1842, held at Taunton, similar points were decided in the case of

JOHN B. TURNER vs. LUTHER BLODGETT & another.

THIS was an action of trespass upon the case, in which the plaintiff alleged that he was the owner of a tract of salt meadow, which was so situated that the

COMMONWEALTH vs. PETER G. DOUGLASS.

Subornation of perjury may be proved by the testimony of one witness.

On the trial of A. for suborning B. to commit perjury on a former trial of A. for another offence, a witness testified that B., on that former trial, swore that he came from L., as a witness on that trial, in consequence of a letter written to him by A. Held, that although this was not evidence that A. wrote such letter to B., yet it was evidence that B. so testified in the presence of A., and as A. thereby had an opportunity to prove, but did not prove, on the trial for suborning B., in what manner or by whose agency B. came from L., such testimony of B. might be considered by the jury, in connexion with the other evidence in the case.

Though a party, who is charged with subornation of perjury, know that the testimony of a witness whom he called would be false, yet if he did not know that the witness would wilfully testify to a fact, knowing it to be false, he cannot be convicted of the crime charged.

To constitute subornation of perjury, the party charged must procure the commission of the perjury, by inciting, instigating or persuading the witness to commit the crime.

THE defendant was convicted, at the last April term of the court of common pleas, of the crime of suborning and procuring one Fanny Crossman to commit wilful and corrupt perjury upon his trial, at a former term of said court, on an indictment against

tide, which flowed and ebbed in a certain navigable stream in Scituate, called Gulf River, would and did, in its natural rise and fall, so irrigate said meadow, as to render it productive of valuable yearly crops of grass; but that the defendants had maintained and kept up a mill dam across said river, below said meadow, and had thereby so obstructed the natural ebb of the tide in said river, as to cause the same to drown and greatly injure said meadow, lessening the quantity and impairing the quality of the grass, &c.

The action was commenced in the court of common pleas. The defendants pleaded the general issue, and gave notice that they, as owners of an ancient mill on said river, claimed and had a right to hold a head of water for working the same, by grant and by prescription, and that if the plaintiff's meadow was thereby flowed, they were not answerable for damages.

Before any evidence was given, the defendants moved that the action should be dismissed for want of jurisdiction. This motion was overruled; the cause proceeded to trial; and a verdict was returned for the plaintiff. Exceptions were alleged to the ruling of the court, as to the admissibility of evidence, &c., and the case was brought into this court.

THE COURT dismissed the action for want of jurisdiction in the court of common pleas, and awarded costs to the defendants.

W. Baylies & Beal, for the plaintiff.

Kddy & Coffin, for the defendants.

him for forgery. He thereupon alleged the following exceptions to the opinions and directions of said court :

1. " The counsel for the defendant contended, that in proving that part of the indictment which alleged that he suborned Fanny Crossman to commit the crime of perjury, it was necessary it should be proved by two witnesses, or by more evidence than the testimony of one witness. But the court instructed the jury, that all which was necessary in proving this part of the indictment was, that there should be sufficient evidence to satisfy them beyond a reasonable doubt.

2. " The court instructed the jury, that if it was proved to them, beyond a reasonable doubt, that the defendant, on the former trial for forgery (stated in the indictment) put Fanny Crossman on the stand, or caused her to be put on the stand, as a witness, knowing that she would testify as set forth in the indictment, and intending that she should so testify, and he put her on the stand, or caused her to be put on the stand, for the purpose of her so testifying, and she did so testify, and such testimony was false, and he knew, when he put her on the stand, or caused her to be put on the stand, that if she did so testify, her testimony would be false ; it would be sufficient to prove that part of the indictment which alleged that the defendant suborned Fanny Crossman to commit perjury, as set forth in the indictment.

3. " One Smith, having been called by the government to prove what said Fanny Crossman testified on the former trial, and having sworn, among other things, to the testimony of said Crossman that she came from Lowell to be a witness on the former trial, in consequence of a letter written to her by the defendant, the court instructed the jury that this was not to be taken by them as evidence that the defendant did write such a letter ; but the fact that she did so testify on the former trial, in the hearing of the defendant, and he thereby had notice that she made such a statement, and had an opportunity, on this trial, if he chose, to prove in what manner and by whose agency she came from Lowell, might be taken into consideration by them.

" The defendant also objected to this portion of the testimony

of Smith, as it was not any portion of the testimony of Fanny Crossman, set forth in the indictment. It was admitted, on the ground that it was proper that the whole of what Fanny Crossman testified on the former trial should be given in evidence on this trial."

The defendant also alleged an exception to the order of the court overruling a motion made by him, in arrest of judgment

F. Hilliard, for the defendant.

Austin, (Attorney General,) for the Commonwealth.

WILDE, J. Upon the trial of this case in the court of common pleas, several exceptions were taken, by the defendant's counsel, to the ruling of the court as to the evidence, and to the instructions given to the jury, upon which he moves for a new trial.

The first exception relates to the evidence necessary to prove the crime charged in the indictment. The defendant's counsel contends that the whole charge must be proved, either by two witnesses, or by one witness and by other independent evidence corroborative of his testimony. It is admitted that such evidence is necessary to substantiate that part of the indictment which alleges that the crime of perjury was committed by the person therein named; and in this respect no objection is made to the instructions of the court to the jury. And as to that part of the indictment, which charges the defendant with subornation of perjury, or procuring the commission of the said crime, we think it very clear that the same rule of evidence does not apply. The reason of the rule in cases of perjury is, that the same effect is to be given to the testimony of the party accused, as to that of the accusing witness, so that if there be no other proof, the scale of evidence is poised; there being witness against witness, oath against oath. No such reason exists as to the proof of that part of the indictment which charges the defendant with the procuring of the commission of the perjury; and this part of the charge, as we think, may undoubtedly be proved by the testimony of one witness. This exception therefore is not founded on any good reason, nor do we find it sustained by any authority.

Another exception to the ruling of the presiding judge, and his instructions to the jury, has been considered by the court, although it does not seem to be of much importance. A witness was called by the prosecuting officer, to prove what Fanny Crossman, charged with the crime of perjury, testified on the former trial; and in stating her testimony, the witness testified, among other things, that she swore that she came from Lowell to be a witness on the former trial, in consequence of a letter written to her by the defendant. The defendant's counsel contended, that the jury should have been instructed to reject this part of the witness's testimony altogether; but the judge left it to the jury, not as evidence of the fact that the defendant did write such a letter, but as evidence that she did so testify in the defendant's presence, and as he did not prove in what manner, and by whose agency, she came from Lowell, that circumstance might be considered by the jury. The evidence is not reported, and we cannot say that the testimony objected to might not have some bearing, in connexion with other evidence, and if it had, we think the charge of the court was correct.

The remaining exception to the charge of the presiding judge is of more importance, and is, we think, well founded. The jury were instructed, that if certain facts stated in the exceptions were proved beyond a reasonable doubt, it would be sufficient proof of that part of the indictment which alleges that the defendant suborned the said Fanny Crossman to commit perjury. Now we are of opinion that all these facts might exist, and yet the defendant might not be guilty of the crime charged in the indictment. The defendant might know, or believe — for he could not know with certainty — that the witness whom he called would testify as she did; and he might know that her testimony would be false; but if he did not know that she would wilfully testify to a fact, knowing it to be false, he could not be convicted of the crime charged. If he did not know or believe that the witness intended to commit the crime of perjury, he could not be guilty of the crime of suborning her. To constitute perjury the witness must wilfully testify falsely, knowing the testimony given to be false. 1 Hawk. c. 69, § 2. Bac. Ab

Perjury, A. 2 Russell on Crimes, (1st ed.) 1753. A witness, by mistake or defect of memory, may testify untruly without being guilty of perjury or any other crime.

There is another inaccuracy or defect in the instructions to the jury, which had a tendency to mislead them, and which we deem material. According to the instructions, the jury were authorized to convict the defendant, although he had never seen the perjured witness, or had never had any communication with her, before she was called to testify. The knowledge he had of what she would probably testify might have been obtained from others, to whom she might have related the facts to which she afterwards testified. And if this were the fact, it is very clear that the defendant is not guilty of the crime charged. To constitute subornation of perjury, the party charged must have procured the commission of the perjury, by inciting, instigating, or persuading the guilty party to commit the crime. The calling of a witness to testify, with the knowledge or belief that he will voluntarily testify falsely, is certainly not sufficient to constitute the crime of subornation of perjury. The facts, therefore, stated in the instructions, do not constitute that crime. The evidence should have been submitted to the jury, with proper instructions defining the crime charged, leaving them to decide, upon the whole evidence, whether the defendant did procure and incite the witness, who was called, to testify falsely, or whether it was her own voluntary act, without any solicitation on the part of the defendant.

Several objections were made to the sufficiency of the indictment, on a motion in arrest of judgment, which have been discussed by the counsel. But as the case is to be sent to a new trial, it is not necessary to express an opinion upon these objections, at the present time.

Verdict set aside, and a new trial granted.

COMMONWEALTH *vs.* MINOT THAYER 2d.

Where one is licensed as a 'taverner,' under Rev. Sts. c. 47, § 21, to sell fermented liquor only, he cannot be convicted of selling spiritous liquor, on an indictment which alleges that he sold it 'without being duly licensed as an innholder.' In such case, the indictment should allege that the defendant, being licensed as an innholder, with authority to sell fermented liquor only, did sell spiritous liquor.

THIS was an indictment on § 2 of c. 47 of the Rev. Sts. alleging that the defendant, "without being duly licensed as an innholder," did, at Milton, on, &c. sell brandy to one Belcher, to be used in the dwellinghouse of the defendant.

It appeared, at the trial in the court of common pleas, that the defendant, at the time of the alleged sale, was duly licensed as a "taverner"; but that his license was so framed as to authorize him to sell wine, or any other fermented liquor, and not to authorize him to sell brandy, or any other spiritous liquor; and thereupon the defendant objected, that there was a fatal variance between the allegation and the proof. This objection was overruled by the court, and evidence was then introduced to prove the selling alleged in the indictment; and the defendant, being found guilty by the jury, alleged exceptions to the ruling of the court.

Hallett, for the defendant.

Austin, (Attorney General,) for the Commonwealth.

DEWEY, J. The indictment alleges that the defendant was not duly licensed as an innholder. The proof in the matter, as it seems to us, does not support this broad allegation. The form of the indictment is that which is usually adopted, in prosecutions for selling spiritous liquors, against those who have no species of license as innholders. But the licenses, granted under the Rev. Sts. c. 47, § 21, do render the persons receiving such licenses innholders to a certain extent. They are so described in the statute, and have the general powers and privileges of innholders, being restrained only in the particular matter of selling spiritous liquors. We think, therefore, that the exception taken to the sufficiency of the evidence to sustain the present indictment, in its general and unqualified allegation that the defendant was not licensed as an innholder, must prevail.

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We are of opinion, however, that the statute itself prohibits persons, who have only a license "to sell wine, beer, ale, cider and other fermented liquors," from selling spiritous liquors, and that they are liable to the penalties of the statute, if they violate the law in this respect; but in such cases, the indictment must describe truly the facts, reciting that the defendant, being only licensed as an innholder, with authority to sell wine, beer, ale, cider and other fermented liquors, did, in violation of law, sell spiritous liquors; accompanying the allegation with the other usual necessary averments.

Verdict set aside.

ELISHA A. JONES vs. LEWIS RICHARDSON, Executor.

In a suit to recover a legacy of an executor, who is residuary legatee, and has given bond, pursuant to the Rev. Sta. c. 63, § 3, to pay all the debts and legacies of the testator, the plaintiff is not required to give any other proof, besides such bond, that the defendant has assets in his hands. And it seems, that such executor, who has given such bond, is bound to perform the condition of his bond, although he has not assets.

A writing given by a child to a father, acknowledging the receipt of an advancement, cannot be used by way of set-off in a suit by the child to recover a legacy given to him in a will afterwards made by his father, nor as evidence of the payment or redemption of such legacy.

A judgment against a claimant, which is a bar to another suit on the claim, is also a bar to the use by him of the same claim by way of set-off.

ASSUMPSIT to recover a legacy given to the plaintiff's wife, (who died before this action was commenced,) by the last will of Asa P. Richardson, the defendant's testator. Trial in the court of common pleas, before *Strong, J.*

It was proved and admitted, that Asa P. Richardson, the testator, made and duly executed his last will, on the 4th of August 1836, by which the defendant was made executor and residuary legatee, and in which a legacy of \$200 was given to Hannah Jones, wife of the plaintiff; that said will was proved and allowed on the 15th of August 1837, and that the defendant took upon himself the trust of executor, and gave bond, with sureties, conditioned to pay all the debts and legacies of said testator.

It was in evidence, that before the making of said will, said Hannah was married to the plaintiff, and continued his wife until after the will was proved, but that she deceased before the commencement of this action ; and that the plaintiff had duly made a demand on the defendant to pay said legacy.

The defendant contended, upon this evidence, that the plaintiff had failed to make out a case, as he had not proved assets in the hands of the defendant ; and he requested the court so to instruct the jury. But the court ruled that the plaintiff was not bound to prove assets in the defendant's hands.

The defendant then offered in evidence three receipts given by the plaintiff to the testator, each of them being expressed to be in part of the portion of the plaintiff's wife in her father's (the testator's) estate. The first of these receipts was for \$383, dated April 2d 1821 ; the second, for \$50, dated December 25th 1822 ; and the third, for \$130, dated June 18th 1823.

The defendant also offered in evidence a promissory note given by the plaintiff to the testator, dated April 21st 1821, and subscribed by an attesting witness, promising to pay the testator \$80 on demand.

It appeared that the defendant, as executor, had brought an action against the plaintiff, on said note, and that at the April term, 1841, of the court of common pleas, a verdict was returned in favor of the defendant in that action, (the plaintiff in this,) on which verdict a judgment was rendered.

It also appeared that said testator made several wills, before he made that under which the plaintiff claims the legacy now sued for ; which wills were, from time to time, cancelled when a new will was executed.

The court ruled that the abovementioned receipts and note could not be admitted in defence of the action, and directed the jury that the plaintiff was entitled to their verdict, which they returned accordingly. The defendant alleged exceptions to the rulings of the court.

J. P. Bishop, for the defendant.

Wilkinson, for the plaintiff.

SHAW, C. J. This is an action at common law, by the hus-

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band of a deceased legatee, against the defendant as executor. No question is made in the case, of the husband's right to sue for a legacy given to his deceased wife ; in fact it does not appear that he does not sue as administrator, in which capacity he would have a right to sue and recover the amount to his own use. His discharge would be a good bar to any other claim ; and therefore the exception, if taken, would only involve a question of amendment, and perhaps of costs. But we understand that the exception is expressly waived ; and I mention it, only lest it should be understood as the opinion of the court, that the husband, after the decease of his wife, may sue for a chose in action, which accrued to her during coverture, in his own right, contrary to decided cases.

This is an action at law for a legacy, and it is expressly given by the Rev. Sts. c. 66, § 16, following the old *St.* of 1783, c. 24, § 17. The great question in the case is, whether the defendant, being residuary legatee, and having given bond, conditioned to pay all the debts and legacies, pursuant to the provisions of the Rev. Sts. c. 63, §§ 3, 4, can object to want of proof of assets ; or rather, whether the production of such a bond from the probate office is not conclusive evidence of assets in the hands of the defendant : And we are strongly inclined to the opinion that it is.

In the first place, it seems very clear from the statutes that such a bond is *primâ facie* evidence of assets, in favor of a legatee and against an executor ; and, being *primâ facie* evidence, it would stand as conclusive, unless controlled and rebutted by countervailing proof on the other side

It is the manifest policy of the statutes of this State, to require, as the general rule, both executors and administrators to return an inventory of both the real and personal estate, with an appraisalment on oath, by competent persons. The obligation of the executor to make such inventory complete is secured by his oath and his bond ; and on a return of such inventory, after time for diligent inquiry, he is still bound in like manner to make a further return, if further property of his testator should come to his knowledge. He is also armed with a power.

with the aid of the judge of probate, and upon interrogatories, to require disclosures, on oath, of any person suspected of concealing or embezzling the property. Rev. Sts. c. 65, § 7. The obvious purpose of these provisions is, we think, that creditors and legatees may have, on the records of the probate court, the most authentic evidence of assets. But as a benefit and indulgence to an executor, who is also a residuary legatee, this inventory is, at his election, dispensed with, provided he will give a bond conditioned to pay all the debts and legacies. The provision in Rev. Sts. c. 65, § 1, is, that he shall be thereupon excused from returning an inventory. The purpose of this provision cannot be mistaken. In the case supposed, where the executor is himself the residuary devisee and legatee, it is obvious that no person can have an interest in providing and preserving evidence of assets, but creditors and legatees. If therefore—such is the substance of this enactment—the executor will put creditors and legatees in as good a situation, as if an inventory had been returned, he may be excused the labor and expense of making one. It is at his own option to give such bond, or one in the usual form. In the latter case, the executor would be responsible only for the assets received. It is said that a bond to pay debts and legacies is taken almost as a matter of form, in the probate office, with very little regard to the state of the assets. If it be so, it is certainly a very rash practice, and one to be discountenanced. It is very convenient in many cases; as where, for instance, a man of ample fortune leaves one or two sons, with few debts and small legacies; but can never be resorted to safely, where there is any doubt of the assets.

One mode of testing this question is, to consider what would be the effect, if such executor were sued for a debt. Could he plead *plene administravit*, or represent the estate insolvent? We think not. Such a representation must be founded practically on a comparison of the list of claims, with the assets, of which the inventory is usually the evidence.

Perhaps it may be said, that by the express condition of the bond, the executor and his sureties are bound to pay the debts

and legacies ; that creditors or legatees have a remedy, in the name of the judge of probate, on the bond ; and that such is their only remedy. But this is opposed, both by the statute and by a long course of decisions. It is provided by the Rev. Sts. c. 63, § 4, that the giving of such bond — to pay debts and legacies — shall not (with certain exceptions) discharge the lien on the real estate of the testator, &c. But in order to charge the real estate, or the goods and personal estate of the testator, it is necessary to obtain a judgment against the executor ; and this shows conclusively that the bond was intended as a cumulative, not an exclusive remedy, and that the creditors and legatees were left to the usual remedy against the executor, as such. Otherwise, it would happen, that although the testator left ample property, yet if the executor and the sureties on his bond should become insolvent, the legatee would be without remedy.

That such a bond is collateral security only, leaving the legatee to any other remedy he may have, has been decided as the true construction of a similar provision in St. 1783, c. 24, § 17, by a series of cases. *Gore v. Brazier*, 3 Mass. 542. *Thompson v. Brown*, 16 Mass. 180.

In the case of *Stebbins v. Smith*, 4 Pick. 97, it seems to have been rather taken for granted, than decided by the court, that giving a bond to pay debts and legacies was an admission of assets to pay debts. *Clarke v. Tufts*, 5 Pick. 337.

The cases cited for the defendant, from the New York reports ; *Ten Eyck v. Vanderpoel*, 8 Johns. 120 ; *Schoonmaker v. Roosa*, 17 Johns. 301 ; *Bank of Troy v. Topping*, 9 Wend. 273 ; have no bearing on this case. I am not aware that there is any such statute in New York. Those cases merely show that an executor or administrator, having given his own promissory note for the debt of his testator or intestate, is not bound beyond the amount of assets. Beyond that, the promise is *nudum pactum*. Here the question is, whether the bond is an admission of assets.

It is not merely by force of the bond, as a contract, that the admission of assets is shown ; it is rather the result arising from the fact of giving the bond, the provisions of law under which it is given, and the entire power, which the executor thereby acquires over the estate, and the exemption which he thereby

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obtains, from furnishing the usual proof of assets. To many purposes, the executor, having given such bond, is thereby and by force of the will, regarded as the absolute owner of the estate of the testator.

It is quite sufficient for the purposes of the present case, to hold that such bond is, *primâ facie*, an admission of assets, without holding it conclusive ; because the executor offered no evidence to rebut the inference to be drawn from it. Whether it would be competent for an executor, after giving such bond, to show that he acted under some palpable mistake, or that the whole property of the testator had been destroyed by means over which he had no control, we give no opinion. In a direct action on the bond, in the name of the judge of probate, it is difficult to see how such a defence could prevail ; because the condition of the bond is not to pay if there are assets, but to pay at all events.

It is further argued, that the court erred in ruling that the plaintiff was not bound to prove assets in the hands of the defendant. This was said in answer to a suggestion of the defendant, that upon this evidence, the plaintiff had failed to make out a case, inasmuch as he had not proved assets in the hands of the defendant ; and he thereupon requested the court so to instruct the jury. This instruction must be taken with reference to the subject matter and the state of the proof ; in which case it was correct. It was, in effect, that no other proof of assets in the hands of the defendant was necessary, at least until something was offered on the other side.

In regard to the note and receipts offered in evidence by the defendant, we are of opinion that they were rightly rejected. The note, supposing it offered by way of set-off, could not avail, because a suit had been brought upon it, by the present defendant, and judgment was thereon rendered for the then defendant, which is a bar. Being a bar to another action, on the principle of *res judicata*, it is equally effectual as a bar to the use of the same note by way of set-off.

As payment or ademption of the legacy, neither the note nor the receipts could avail, because the will was made long after

they were given. Had the father died intestate, these receipts would have been good evidence of advancements ; but when a man makes his will, all prior advancements are considered merged, and the testator must be deemed to have graduated the amount of his legacy to his daughter, with reference to prior advancements.

Exceptions overruled.

WILLIAM W. COWELL *vs.* FISHER THAYER.

Where a mill owner has acquired a prescriptive right to keep up a dam constantly which, in its usual operation, would raise the water to a certain height, although from the leaky condition of the dam, or the rude construction of the machinery in his mill, or the lavish use of the stream, the water has not been usually and constantly kept up to such height, yet if he repair the dam, without so changing it as to raise the water higher than the old dam, when tight, would raise it, or if he use the water in a different manner, and thereby keep up the water more constantly than before ; this is not a new use of the stream, for which a land owner can claim damages, but is a use conformable to the mill owner's prescriptive right.

THIS was a complaint, in which it was alleged that the respondent, Thayer, on the 7th of September 1838, erected and had since, until the bringing of this complaint, on the 7th of September 1841, kept up a dam in the town of Wrentham, across a stream of water running from Whiting's Pond to Charles River, for the purpose of raising and detaining water to drive and carry certain mills upon and near said dam ; whereby the complainant's lands had been overflowed, during all parts of each year since said dam was so erected. He therefore prayed that a jury might be empannelled to assess his damages and determine to what height said dam should be kept up, and during what part of the year it should be left open, &c.

The respondent pleaded the general issue, and filed a specification of the grounds of his defence. The specified ground of defence, on which the question of law arose, was this : " The respondent will deny that said dam has been raised or altered, for more than 20 years, and will offer evidence to that effect. He will contend, and offer evidence to prove, that he, and those under whom he claims and justifies, have had and still have the

right to flow all the lands which have been flowed by means of said dam, and which said dam is calculated and adapted to flow ; and that he and they have had and still have the right to keep up and maintain said dam to its present height, without any liability to pay damages therefor to said complainant."

It appeared in evidence, at the trial in the court of common pleas, before *Strong*, J. that the respondent's mill had been erected about 30 years, and was built on an ancient privilege, where there had been a dam and mills from the early settlement of the town ; that the original dam was repaired about 40 years ago, and " was then raised a little, to bring it up to its original height, as it was supposed to have settled somewhat ;" and that the owners and occupants of this privilege have never paid any damage for flowing.

The respondent introduced evidence to prove that the water was not flowed any higher on the complainant's land, during the three years next before the bringing of this complaint, than it was flowed during the 20 years next preceding said three years.

The complainant introduced evidence to prove that the respondent, during said three years—though the dam might not be any higher, and the water might not have been flowed higher on the complainant's land, than it was during said 20 years—had kept the water on said land for a longer time, and for a greater proportion of the year, particularly in the spring and summer during said three years, than it was kept during said 20 years.

It was in evidence, that Whiting's Pond (at the outlet of which said dam was erected) was affected by droughts, and that it generally fell "some feet" in the course of the summer and autumn, and thus remained till the autumn rains ; but that there was no regularity in the time when the pond fell away, or in the length of time of its remaining low ; this varying as the seasons were more or less dry, and the water more or less economically used.

The respondent contended that the evidence introduced by him proved that, for one of said 20 years, he had kept the water on the complainant's land at as great a height, and for as long a

time, and during as great a proportion of the year, as it had been kept up during said three years.

It appeared that for two seasons next preceding the bringing of this complaint, the water had been kept up to high water mark, and upon the complainant's land, a greater proportion of the season and for a longer time than it was during the said 20 years, with the exception of the one year before mentioned; and that this was in consequence of the respondent's having repaired leaks, closed one of the fooms, and used the water more sparingly by reason of using less machinery.

The court instructed the jury, "that if they were reasonably satisfied from the evidence, that the respondent, during the three years mentioned in the complaint, or during two of those years, kept the water up at high water mark, and kept it on the complainant's land, in consequence of the manner in which he used his mill, for a longer time, and for a greater proportion of the year, than it was kept up, and kept on his land, during the 20 years next preceding said three years, except during one year, though they should also be satisfied that the dam was no higher, and the water flowed no higher on the complainant's land, than during said 20 years; and also that for one of said 20 years, the water was kept on the complainant's land as long, and for as great a proportion of the year, as it was during said three years; they should find a verdict for the complainant."

A verdict was returned for the complainant, and exceptions were alleged by the respondent to the instructions given to the jury.

Wilkinson, for the respondent, cited Angell on Watercourses, (3d ed.) 109. *Alder v. Savill*, 5 Taunt. 454. *Baldwin v. Calkins*, 10 Wend. 167. *Williams v. Nelson*, 23 Pick. 141. *Bolivar Manuf. Co. v. Neponset Manuf. Co.* 16 Pick. 241.

Merrick & Cleveland, for the complainant, cited 3 Kent Com. (1st ed.) 356. *Buddington v. Bradley*, 10 Connect. 213. *Stiles v. Hooker*, 7 Cow. 268. *Simpson v. Seavey*, 8 Greenl. 138. *Drewett v. Sheard*, 7 Car. & P. 465.

SHAW, C. J. This case presents a question of some importance to the rights of mill owners, and the owners of lands liable to be flowed.

Several points must be considered as now well settled. The owner of the land, over which there is a running stream, has a right to the use of the natural flow of the stream, to be reasonably used for mill purposes. No proprietor of land, on the same stream, has a right to divert the water or change the use of it, (independently of the statute right of flowing upon payment of damage,) to the injury of any other proprietor, unless such right has been acquired by grant or prescription; but where the mill owner has in fact exercised the right of raising or diverting the water, by keeping up his dam and flowing the land of another for a period of twenty years, without objection or claim of damages, it is evidence of a right so to use the water, as acquired by prescription or grant. *Bolivar Manuf. Co. v. Neponset Manuf. Co.*, 16 Pick. 241. *Williams v. Nelson*, 23 Pick. 141. *Mason v. Hill*, 3 Barn. & Adolph. 304. *Buddington v. Bradley*, 10 Connect. 213. *Baldwin v. Calkins*, 10 Wend. 167.

But it is equally well settled by the authorities, that if one proprietor has, by means of a dam, made a special use of the water, by penning it up, and throwing it back upon a proprietor above, or by holding it back from a proprietor below, or by diverting it, and has so used the water, without resistance or opposition from other proprietors, for the term of twenty years, he thereby establishes a right so to continue the use of it, by way of prescription or presumed grant.

We are then brought to the precise question, whether a mill owner, who has acquired a prescriptive right to maintain the water at a certain height, and who has erected a dam capable, in its ordinary operation, of raising the water to a greater height, but who, from the leaky condition of the dam, and his wasteful mode of using the water, has, for a considerable part of the 20 years, in fact not raised the water to the height, at which the dam, when tight, is capable of raising it, and by means of which the stagnant water has not been kept constantly so high on the land of an adjacent proprietor, can repair and tighten his dam, without raising it, and so change his machinery, by the substitution of breast wheels or over-shot wheels, for the under-shot wheels formerly used, as to keep up the water constantly to its higher level.

It is contended on the part of the land owner, that as the actual use of the water at a given height, by the mill owner, and the acquiescence in such use, by the land owner, is the foundation and proof, so it must also be the measure and limit of his right. This, to some extent, is true ; and where there is a definite limitation or modification of the use—one that is practicable and measurable—it will show a corresponding modification of the right. As where, for example, according to the custom of the country, a saw mill, or other mill, has been kept up in the winter only, and the mill owner has uniformly been accustomed to draw off the water sufficiently early in the spring to allow the growth of a crop of grass, and to continue it down, until the hay is cut and got in, it must be regarded as establishing a right to a winter privilege only, and not a constant privilege ; and then, flowing the land through the year must be considered as a new use, not within the mill owner's prescriptive right.

So, where a dam had been kept up more than twenty years, but the water had been drawn down six weeks in each year, between June and October, to enable the land owners to get clay, it was considered good evidence of a right to keep up the dam, subject to such limitation. *Bolivar Manuf. Co. v. Neponset Manuf. Co.*, 16 Pick. 241. Other cases may easily be imagined, where a prescriptive right, proved by use and enjoyment, may be limited and qualified by a definite interruption in the constancy of such use, for a certain time or purpose, in favor of the person against whom the right is claimed. But in determining the legal rights of parties, the law looks rather to practical than theoretical distinctions, and seeks, as far as possible, to place them upon grounds permanent and general, and upon principles applicable to the generality of cases, not shifting and varying with a slight change of circumstances. The right, when once established, shall be construed favorably to the party acquiring it. Conformably to these rules, it has long been held that where one has acquired a right to raise and maintain a head of water, by using it for one purpose, he may apply it to another : he may substitute a cotton factory for a saw mill, and

the like ; and this upon the ground that any other rule would put a stop to all improvements. *Cottel v. Luttrell*, 4 Co. 87. *Saunders v. Newman*, 1 Barn. & Ald. 258. *Biglow v. Battle*, 15 Mass. 313. *Johnson v. Rand*, 6 N. Hamp. 22. It comes, we think, within the spirit of the same rule, to hold, that when a man has, by his dam, raised a certain head of water, and maintained such dam long enough to raise the presumption of a grant. he may not only use his head of water for another purpose or branch of business, but he may repair his dam, and make it tighter. he may use improved machinery, taking the water from the top instead of the bottom of the floom ; and generally, he may use the water more economically, although the effect may be, to keep the water more constantly at the upper level. *Alder v. Savill*, 5 Taunt. 454.

As a general rule, the height, to which such a mill owner will have a prescriptive right to maintain the water, will depend upon the height of the dam, by which he has raised it. In speaking of the height of the dam, we mean it to be understood, as the efficient height of the dam ; the height to which such dam, when completed and finished, with its rolling dam, waste ways, &c. and in good repair and condition, will raise the head of water. Parts of the dam of earth, or other materials, may be raised higher than it is ever intended to raise the water by such dam. This is not intended ; but as already explained, the efficient height.

On the whole, we think the true rule is this ; that when one has acquired a prescriptive right to a constant mill privilege, by keeping up and using a dam more than twenty years, which dam, in its usual operation, would raise the water to a given height, and has used it, at his own pleasure, at that height, without any claim of right, on the part of any other person, to have it drawn or kept down, for any part of the year, or upon any definite occasion, he has a right to retain it at the same height, although from the former leaky condition of the dam, the rude construction of the machinery, or the lavish use and waste of the stream, the water has not in fact been constantly or usually kept up to that height. If therefore he repairs the dam, without so changing

it as to raise the water higher than the old dam, when tight and in repair, would raise it, or uses it in a different mode, and thereby keeps up the water more constantly than before, it is not a new use of the stream, for which an adjacent owner can claim damages, but a use conformable to his prescriptive right.

As it appears by the exceptions, that the court of common pleas gave a different instruction to the jury, in the present case, the court are all of opinion, that the verdict for the complainant must be set aside, and a

New trial granted

**PRESIDENT, DIRECTORS, &C. OF THE NEPONSET BANK
vs. DANIEL LELAND, JR.**

Where a negotiable note is indorsed to a bank by the payee, as collateral security for one only of several demands on which he is liable, the bank has no lien on such note as security for any other demand against the indorser: And in a suit on such indorsed note, brought by the bank against the maker, after the demand which it was pledged to secure has been paid, the maker, acting under the authority of the indorser, may successfully defend against the right of the bank to recover.

ASSUMPSIT on two promissory notes made by the defendant, payable to Addison Boyden or order, and by him indorsed in blank. One of these notes was dated December 10th 1840, and payable in five months; the other was dated January 6th 1841, and payable in four months.

The case was submitted to the court on the following facts: On the 12th of October 1840, the plaintiffs discounted for said Boyden a note for \$ 300, signed by Daniel Leland, sen. dated September 26th 1840, payable to said Boyden, or order, in four months, and indorsed by him. This note was not paid by the maker, at maturity, and the indorser had due notice of its dishonor. But the note lay in the plaintiffs' hands unpaid, till May 5th 1841.

On the 11th of January 1841, the plaintiffs discounted for said Boyden a note for \$ 113, which was dated on the 1st of said January, payable to him, or order, in four months, signed by Seth C. Hawes, and indorsed by said Boyden.

On the day of the maturity of the aforesaid note of \$ 300, signed by said Daniel Leland, sen. (viz. January 29th 1841) said Boyden pledged to the plaintiffs the notes now in suit, by indorsing them in blank, expressly as collateral security for payment by him, as indorser, of said \$ 300 note.

On the 5th of May 1841, said Daniel Leland, sen. paid said \$ 300 note, and, as agent for his son, the present defendant, asked the plaintiffs to deliver up the notes now in suit, which they refused to do, on two grounds ; *first*, because they had a lien on those notes to secure payment of the abovementioned note signed by Hawes ; and *secondly*, because said Daniel Leland, sen. showed no authority from Boyden to take the notes.

On the 4th of May 1841, said Boyden received due notice from the plaintiffs that said note of Hawes, indorsed by him, was dishonored, and thereby became liable, as indorser, to pay the same to the plaintiffs. But said note has never been paid.

In June 1841, the defendant, professing to act solely as agent of said Boyden, with a written authority from him, demanded of the plaintiffs the notes now in suit ; but the plaintiffs refused to deliver the same, claiming a right to retain them as security for the payment, by said Boyden, of the Hawes note by him indorsed. This claim they notified to Boyden on the 5th of May 1841, the day after said Hawes's note was dishonored.

The defendant was at the plaintiffs' banking house, soon after the notes now in suit were pledged by said Boyden, as aforesaid, and long before either of them fell due ; and these notes were shown to him by the plaintiffs, and he averred that they were business notes, and promised the plaintiffs that he would pay both of them on the day when the first of them should fall due. But no payment on either of said notes has been made to the plaintiffs or to said Boyden.

E. Ames, for the plaintiffs. Bankers, who discount bills or notes for a customer, have a lien, while such bills or notes remain unpaid, upon his negotiable securities that come into their hands, and may put the same in suit. *Bolland v. Bygrave*, Ry. & Mood. 271. See also *Davis v. Bousher*, 5 T. R. 488. *Jourdain v. Lefevre*, 1 Esp. R. 66. *Bosanquet v. Dudman*,

1 Stark. R. 1. *Scott v. Franklin*, 15 East, 428. The defendant cannot object to the maintenance of this action by the plaintiffs, as they hold the notes under the indorsement of the payee. It is a question between Boyden and the plaintiffs, how the money, when collected, shall be applied.

Cleveland, for the defendant. These notes, though pledged by Boyden after the plaintiffs had discounted Hawes's note for him, were pledged as security only for payment of the note of Leland, sen. This fact shows that the plaintiffs received the notes "under special circumstances," which, as Lord Kenyon said, in *Davis v. Bousher*, take the case "out of the common rule" as to bankers' general lien. See Story on Agency, § 381. Montagu on Lien, (Amer. ed.) 46, 47. Admitting that by the law of England, the plaintiffs might recover on these notes, yet they cannot recover by the law of Massachusetts. There is no known adjudication in the United States, which recognizes the English law as to bankers' general lien. And it may be doubted whether our incorporated banks come within the reason of the English law concerning bankers. Besides; general liens are not regarded with particular favor, as particular liens are, and must be established by clear evidence of usage, or the particular dealings of the parties. Yelv. (Amer. ed.) 67 h, and cases there cited.

As the defendant acts under the authority of Boyden, in resisting the plaintiffs' claim, they cannot deny his right to make defence.

DEWEY, J. The plaintiffs contend that they are entitled to enforce the collection of the notes of the defendant, and hold the avails thereof to be adjusted in a general settlement of their dealing with Addison Boyden. They rely upon the principle, that a banker has a lien on all the paper securities which come into his hands, for a general balance. And the general principle, subject to its proper limitations, may be well sustained by authorities: As in *Bolland v. Bygrave*, Ry. & Mood. 271, which was a case of bills delivered by a party to be discounted in the ordinary course of business, and where it was held, in the opinion given by Abbott, C. J., that a banker has a lien upon

any securities of the customer, which may for any purpose be placed in his hands. Lord Kenyon, in *Davis v. Bousher*, 5 T. R. 491, states the principle thus : " I am clearly of opinion that by the general law of the land a banker has a general lien upon all the securities in his hands, belonging to any particular person, for his general balance, unless there be evidence to show that he received any particular security under special circumstances which would take it out of the common rule." Judge Story, in his treatise on Agency, § 381, places the matter in its true light. He states the general principle as before stated by Lord Kenyon, and C. J. Abbott, giving the banker a general lien upon all notes, bills and other securities deposited with him by his customer, for the balance due on general account ; but he adds, " here, as in other cases of lien, the right to retain for the general balance of accounts may be controlled by any special agreement which shows that it was not intended by the parties. Thus, for example, if securities have been deposited with a banker as a pledge for a specific sum, and not generally, that will repel the inference that they were intended to give a lien for the general account or balance between the parties."

In recurring to the facts agreed upon in the present case, it appears distinctly, that the notes in controversy were pledged by Addison Boyden to the plaintiffs, expressly as collateral security for his engagement as indorser of a note for \$ 300 given by Daniel Leland, sen., discounted by the plaintiffs, and not paid at its maturity. That note being subsequently paid by Leland, sen., these notes ceased to be held on the particular pledge ; and the inquiry then arises, whether upon any principle of the law of lien, they may be retained against the will of the pledgor or those who represent him, and be treated as collateral security for other liabilities of Addison Boyden created before the deposit of these notes with the plaintiffs ; for it must be carried to that extent, as the note of Hawes was indorsed by Boyden, months before the transfer of these notes as collateral security for Boyden's liability on the note of Leland.

Taking the principles, as found in the cases cited, to be applicable in this Commonwealth, and assuming also the plaintiffs'

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relation to Addison Boyden to be that of a banker, it seems quite clear to us, that the plaintiffs did not acquire any lien on the notes in suit, for any precedent liabilities of Boyden, by reason of his having indorsed other notes besides that of Leland. This is not a case of an implied lien. The notes were deposited under special circumstances ; they were not pledged generally, but specifically ; and this negatives any inference of any general lien, if, in the absence of such special agreement, the law would imply one. In any view we can take of this case, we can perceive no ground on which the plaintiffs can establish a right to retain these notes.

It was suggested at the argument, that as the plaintiffs held these notes under a regular transfer of the legal title, it was not competent for the defendant to take the objection of the want of interest, or want of property in the same, in the plaintiffs. This might be a good answer, if the defence was only taken at the instance of the defendant ; but inasmuch as the defendant acts with the assent and concurrence of Boyden, and with a written power of attorney from him to demand these notes of the plaintiffs, we think he may interpose the defence relied upon, and that, for the reasons already stated, it must avail him.

Plaintiffs nonsuit.

SAMUEL P. ALLEN vs. EDWARD HALL.

A. attached the goods of B. his debtor, and caused them to be sold at auction on the writ, without conforming to the provisions of the Rev. Sta. c. 90, §§ 57-61, and himself became the purchaser of the goods, and took them into his possession. Held, in a process of foreign attachment, in which A. was summoned as trustee of B., that he could not set off the debt, due to him from B., against the value of said goods, but that he was chargeable, as trustee of B., to the amount of the value of the goods.

SCIRE FACIAS. The defendant had been summoned as trustee, in a suit brought by the plaintiff against Joseph Tufts, in the court of common pleas, and been charged, on his answers, as trustee of said Tufts. But as he refused to expose any property on the execution, which issued on the plaintiff's judg-

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ment against Tufts, or otherwise to satisfy that execution, the present suit was commenced at the April term 1841, of the court of common pleas, when the defendant was permitted to make further answers. From those answers it appeared, that previous to the service of the trustee process on the defendant, said Tufts was indebted to him, and that he had commenced a suit against Tufts, attached his personal property, and caused said attached property to be sold at auction, by the officer who attached it, or by an auctioneer appointed by the officer, and that the defendant himself became the purchaser of most of said property, and took possession thereof; but that there was no consent of Tufts that the property should be so sold, (he having absconded,) nor any appraisalment thereof, according to the Rev. Sts. c. 90, §§ 57-61. On these facts, the defendant claimed a right to set off the amount of the debt due to him from Tufts, against the value of said property so in his hands. This claim was allowed by the court of common pleas, and the defendant was discharged. The plaintiff thereupon appealed to this court.

F. Hilliard, for the plaintiff.

Griggs, for the defendant.

SHAW, C. J. In *scire facias* against a trustee, the question is, whether the defendant can set off demands, which he had at the time he was summoned in the suit, against Joseph Tufts, the principal defendant.

The trustee process, provided for by statute, manifestly contemplates two distinct classes of cases, in which a creditor may avail himself of its provisions to secure his debt, by attaching property in the hands of a third person; the one, when the trustee has in his custody, or under his control, goods or chattels, liable by law to be attached on mesne process, by the ordinary writ of attachment; the other, where the trustee is a debtor to the principal defendant, and owes him money, either due and payable presently, or existing as a debt at the time of the attachment, though payable at a future day. *Maine F. & M. Ins. Co. v. Weeks*, 7 Mass. 438. *Swett v. Brown*, 5 Pick. 178.

This distinction is founded on the statute rendering *goods* and

credits, respectively, liable to attachment. In the former case, the attachment binds the goods specifically, creates a lien upon them, of the same nature and to the same extent, as an ordinary attachment on mesne process, although the goods are to *stand charged*, in the hands of the trustee, so that the custody remains with the trustee, instead of being taken by the attaching officer, unless a subsequent attachment is made by another creditor, which may be done, subject to the first attachment. *Parker v. Kinsman*, 8 Mass. 486. *Burlingame v. Bell*, 16 Mass. 318. But in both cases, the goods thus charged are deemed to be in the custody of the law, and they are made applicable to the purpose for which they are attached and held, in the same manner; that is, by being advertised and sold by the officer on execution, and the proceeds applied to its satisfaction. The only difference is, that in the case of the trustee attachment, the goods, having remained in the custody of the trustee, must be by him exposed and delivered over to the officer holding the execution; whereas, in the case of an attachment by the ordinary process, the goods are in the custody of the officer, ready to be sold on the execution, when it comes into his hands for satisfaction.

But under the other clause of the statute, rendering *credits* liable to be attached, the case is wholly different. It affects another species of property, and accomplishes its purposes in an entirely different mode. The great question then, the only question is, whether he *owes* the principal debtor any thing; and if it appears that he does, he is held liable to pay it to his creditor's creditor, instead of paying it to the creditor himself. It is unnecessary here to consider the various questions which may arise, as to the nature of such debts, whether absolute or contingent, and the nature of such contingency; whether, if uncertain at the time, it can be made certain at a future time, by sales, collections of money or other proceedings, showing that in point of fact the trustee was a debtor to the principal at the time of the attachment. In such cases, although the facts are subsequently disclosed, and the accounts subsequently adjusted, in order to

charge the trustee, the result must show that the trustee was a debtor to the principal, at the time of the attachment.

This distinction between the two classes of cases will go far to show in what cases the trustee may or may not set off such claims as he may have against the principal debtor, and to reconcile what may, without discrimination, be deemed to be conflicting authorities.

On the provision, in which the trustee is charged as a debtor, it is very obvious that as he is a mere third party, called in to pay his debt, in a manner different from that in which he was bound to pay it, and in which his own rights are not drawn into controversy, he ought not to be placed in a worse situation than he would be, if he were called to make the settlement with his creditor. The balance only, after all just allowances, is the sum for which he ought to be held. He shall therefore have the benefit of a set-off, legal or equitable, in his own right, or in the right of those with whom he is privy, and in whose favor the debt claimed to be due from the trustee could, in his hands, be made available, by way of set-off in any of the modes provided by law. *Hathaway v. Russell*, 16 Mass. 473. *Picquet v. Swan*, 4 Mason, 443.

But where the trustee has goods in his custody, the property of the principal defendant, and in their nature liable to be attached by the process of law, the question, whether the trustee has any right to set off claims of his own, must depend upon the fact whether he has any lien, legal or equitable, upon such goods, or any right, as against the owner, as whose property they are attached, by contract, by custom, or otherwise, to hold the goods, or to retain the possession of them, in security of some debt or claim of his own. If the party, who is summoned as trustee, has a mere naked possession of the goods, without any special property or lien; if the principal debtor is the owner, and has a present right of possession, so that he might lawfully take them out of the custody, or authorize another to take them out of the custody, of the present holder; they would be liable to be attached as the property of the general owner, by an officer, under the common process of attachment, if he could have ac-

cess to them, and no right of the trustee would be violated. But if the officer cannot have access to the goods, so as to take them into custody ; if they are secreted by the trustee, or if the trustee sets up pretended claims and rights of possession, so that the creditor and officer cannot safely take them out of the custody of the trustee, and require the answer and disclosure of the trustee, as to the grounds of his claim to the property or possession ; then he may be summoned as trustee ; and if it shall subsequently appear, on his disclosures, that he had only such naked possession, without any lien or right of possession, then the goods stand *charged* in his hands, till judgment and execution and he has no greater right to charge these goods with a debt of his own, by way of set-off, than he would have had, if the goods had been taken into custody by the officer, at the time of the attachment. This, we think, is the result of the laws on this subject. *Allen v. Megguire*, 15 Mass. 490. *Swett v. Brown*, 5 Pick. 178. *Brewer v. Pitkin*, 11 Pick. 298.

We are next to consider how these principles apply to the facts of the present case. It appears that the respondent, Hall, sued out a writ against his debtor, Joseph Tufts, and caused his goods to be attached by an officer. Before judgment, without the consent of the debtor, and without the appraisal and certificate required by law to warrant a sale of goods attached on mesne process, the defendant caused the goods to be sold, and himself became the purchaser of the greater part of them, and, for aught that appears in his answers, had them in his possession at the time of the service of this trustee process. This sale, it is manifest, was wholly void, being not conformable to the Rev. Sts. c. 90, and not authorized by law. *Howe v. Starkweather*, 17 Mass. 240. *Russell v. Dudley*, 3 Met. 147.

The respondent obtained the bare custody of the goods, without lawful possession or right of possession. If the respondent could have the goods in security of his original debt against Tufts, or set off that debt, under this process, he would in effect get possession of his debtor's goods, under color of legal process, without conforming to the requisitions of law, and thus avail himself of such unauthorized possession, to the same ex-

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tent as if he had taken and sold the goods on execution in conformity to law ; which he cannot do. The court are of opinion that upon his answers, the respondent was chargeable for the goods of Tufts, when they thus came into his possession, and that not having exposed and delivered them over to be sold, when demanded on the execution, he is now answerable on this *scire facias*, for their value.

EBENEZER CAPEN vs. FRANCIS ALDEN & Trustee.

A debtor gave his creditor a mortgage of personal property to secure a balance of account : The dealing of the parties was afterwards, continued, and the debtor, on being pressed for payment on account, told the creditor that he would endeavor to pay him for the articles he had received after the mortgage was given, and keep the subsequent accounts paid up ; but that, as the creditor had security on the former part of the accounts, he must wait for payment of that part : The debtor afterwards made payments, from time to time, which were credited to him, generally, on the creditor's book, and which exceeded the amount that was due when the mortgage was given, but were less than the amount of the articles afterwards furnished to him by the creditor. At the time when these payments were made, the creditor considered them as made towards payment of the articles furnished to the debtor subsequently to the mortgage : The creditor sold part of the mortgaged property, and took part thereof to his own use ; but the property, so taken by him, and the money received on the sale, were not sufficient to discharge the balance due to him when the mortgage was given.

Held, that the payments made after the giving of the mortgage, though credited generally, on the creditor's book, might be applied by him towards payment of the subsequent accounts ; and that he was not chargeable in the process of foreign attachment, as trustee of the debtor, by reason of his retaining part of the mortgaged property, and the proceeds of the sale of the other part thereof.

THE following facts appeared from the answers of Abiathar Richards, who was summoned as trustee of Alden, the principal defendant : Said Alden made two mortgages of personal property to said Richards ; the first, on the 13th of October 1837, of property worth about \$ 250 ; the second, on the 17th of November 1838. When the first mortgage was given, Alden owed said Richards \$ 340, and when the second was given, he owed him \$ 539. The sums thus due from Alden were balances of accounts for provisions furnished to him, for his tavern in Dedham, by said Richards. Alden afterwards made some pay-

ments, for which Richards gave him credit ; but at the time of the service of the present process on Richards, Alden owed him \$633, a balance of account, besides a note of about \$40. Part of the mortgaged property had been sold by Richards, for \$100, and another part thereof, worth about \$125, he had applied to his own use.

Said Richards annexed his books to his answer, containing an exact account of all the articles furnished by him to Alden, and of all the moneys received by him of Alden, since 1832 ; and he stated, that the moneys credited in the books, the property embraced in the aforesaid mortgages, the note before mentioned, and a mortgage of real estate, (which was subject to a prior mortgage thereon,) dated April 16th 1838, to secure \$300, were all the moneys or property which he had, in any way, received from Alden.

Richards further stated, in his answer, that after he received said mortgages of personal property, he continued to furnish provisions to Alden, (as by his said books appeared,) and " that he considered the property, which was mortgaged, as security for that part of the account due at the time the mortgages were made, so far as they were of sufficient value ; and that whenever said Alden afterwards paid him any sum of money, which is credited upon said books, he considered it, at the time of payment, as made towards payment for the articles delivered subsequently to the mortgages, for which he had no security ; and whenever he sold any of the mortgaged property, or took any of it for his own use, he considered the sum of money he had received for the property so mortgaged, or the value of it, which he was to allow to said Alden, as so much toward the payment of the account which was due at the time of the making of the mortgage, and which the property was mortgaged to him to secure ; that about two or three months after the mortgage was given to him, which bears date November 17th 1838, he pressed said Alden to pay him some money on his account, and that said Alden then stated to him that he would try to raise money and pay for what he had of him (Richards) after the mortgages, and keep those accounts paid up ; but as he (Richards) had some

security upon the others, he must wait for that part of the account."

Wilkinson, for the plaintiff.

Merrick & Cleveland, for the trustee.

HUBBARD, J. The only question in this case respects the application of the proceeds, or value, of the property mortgaged by the defendant to Richards, the trustee. The plaintiff contends that Alden owed Richards only on a running account kept in the book of the latter; and that the two mortgages were given, as is expressed on the face of them, to secure moneys due and owing on account; and that by applying the payments made by Alden, subsequent to the date of the mortgages, according to priority of time, the amounts due, when the mortgages were given, have been paid; and in consequence of it, the mortgaged chattels, now remaining in the hands of Richards, and the proceeds of those sold, being freed from his lien, are the property of Alden, and, as such, liable to be attached, or subject to the trustee process. Under these circumstances, the plaintiff seeks to charge Richards as the trustee of Alden.

To support the proposition, that the chattels and proceeds are liable to the trustee process—admitting, for this purpose, that the moneys for which the mortgages were given as security have been paid—the plaintiff relies upon the cases of *Jarvis v. Rogers*, 15 Mass. 389, and *Allen v. Megguire*, 15 Mass. 490.

In the case of *Jarvis v. Rogers*, p. 397, the point decided was this: "If a debtor obtain of his creditor a loan of money on pledge, upon an express agreement that the pledge shall be restored on the repayment of the loan; the creditor cannot retain the pledge as security for a prior debt, without violating the principles of good faith." But in the present case, the goods were not mortgaged for a specific debt, but generally for moneys due on account; the balance of which account, in the view taken by the plaintiff, now remains unpaid.

In the case of *Allen v. Megguire*, the court decided that "a mere creditor, happening to have in his possession specific articles belonging to his debtor, has no lien upon them. He must attach, as other creditors, if he would avail himself of

them." And if they are so kept by him, as not to be exposed to an attachment by others, he may be summoned and held to answer as the trustee of his debtor. As it respects this decision, however, it is said by Story J. in *Picquet v. Swan*, 4 Mason, 465, that there is a very material qualification of this case in the later one of *Hathaway v. Russell*, 16 Mass. 476, in which the court say, that the trustee "is to be allowed all his demands against the principal, of which he could avail himself in any form of action, or any mode of proceeding between himself and his principal; whether by way of set-off on the trial, as provided by our statutes; or by setting off the judgments under an order of court; or by setting off the execution in the hands of the sheriff, as is also provided by statute. If this were not so, the trustee would be injured by having his claims thus drawn in, to be settled incidentally in a suit between strangers."

Applying these principles, thus laid down, to the case at bar, it is clear that if Alden were the plaintiff, demanding these chattels of Richards, the latter could, either by way of set-off, or by cross action, successfully resist the restoration of the chattels themselves, or the value of them when sold; and all he would eventually be compelled to do, would be to credit the just amount in his account with Alden. But it is not solely on the view thus taken that we decide the case.

The next question for our consideration is, whether the moneys, which were received by Richards subsequent to the taking of the mortgages, but before the property mortgaged was taken to his own use or sold and turned into money, shall be appropriated to the discharge of the items of account prior in time to the date of the mortgages, or whether the property mortgaged shall be appropriated to such discharge.

The plaintiff, regarding this as a running account, contends that the payments, as they were received, shall go to the credit of the debtor, and so reduce his account from time to time, and thus discharge all previous debits, as far as such payments will go. And in the present case, by applying this rule, and relying on the authorities of *Jarvis v. Rogers* and *Allen v. Meggairc*, the mortgaged property, considering it specially assigned to

secure sums previously due, is relieved from the lien of the mortgages, and becomes subject to the present trustee process.

As to running accounts, the plaintiff cites *Clayton's case*, 1 Meriv. 608, and *Bodenham v. Purchas*, 2 Barn. & Ald. 39 ; and they certainly do maintain the position, that in a running account between a banker and his correspondent, payments shall be applied to the extinguishment of preceding credits. In *Clayton's case*, Sir William Grant says, "in such a case, there is no room for any other appropriation than that which arises from the order in which the receipts and payments take place, and are carried into the account. Presumably, : 's the sum first paid in, that is first drawn out. It is the first item on the debit side of the account, that is discharged or reduced by the first item on the credit side. The appropriation is made by the very act of setting the two items against each other. Upon that principle, all accounts current are settled, and particularly cash accounts."

We do not doubt the correctness of these decisions ; that in *Clayton's case* having been made on great consideration, after a careful examination of the cases on the subject of the appropriation of payments. But we think the facts in the present case differ materially, as they are disclosed by the trustee, from those which appeared in the cases relied upon. This is not the case of merchant and merchant, with the various books in which their accounts are entered, from the day-book, &c. to the ledger, where every entry is made with precision, and balances are regularly struck ; but it is the account of a butcher supplying meats to an innkeeper, making a simple memorandum of his daily transactions.

On examining the books of Richards, coupled with his answer, we do not think they furnish satisfactory evidence that the account between these parties was simply a running account, as the plaintiff contends. It is true the entries are made daily, as the articles were delivered ; and payments are entered as they were made. But in applying mercantile rules to the case, it is obvious that the party has a right to post his entries, and to state his account in his books, according to the truth ; and in case of

mistakes, to make such alterations or transfers, as will rectify the errors, and thus preserve his rights. *Barker v. Blake*, 11 Mass. 16.

If therefore the mortgaged property was in fact to be applied to the payment of the preceding charges, the party, in posting his books, would have the right to make his entries in such a manner, as to make the fact of such application appear by appropriate credits. And this right is not lost by the mere omission to make such postings.

In looking at the answers of the trustee, to which, with the books, we can alone resort for the facts to guide us, we find that he considered that the property was mortgaged as security for the amount of the account due at the time the mortgages were made. And whenever Alden afterwards paid him any money, he considered it, *at the time of payment*, as made towards the payment of articles delivered subsequent to the mortgages, and for which he had no security. And on sale of, or assuming for his own use, the mortgaged chattels, he considered the proceeds as a payment, in part, of the money due at the time of taking the mortgages. And he further swears, that two or three months after taking the last mortgage, he pressed Alden to pay him some money on his account, and that Alden then stated that he would try to raise money, and pay him for what he had after the mortgage, and keep *those accounts* paid up ; but that, as he had some security upon the *others*, he must wait for that part of the account.

Whether the facts which existed when the trustee received the mortgages, and his own view of the subsequent payments, would constitute an appropriation by him of the mortgaged property and its proceeds, is not free from doubt ; but coupled with the statement to him by Alden, shortly after the making of the mortgages, when he was pressing Alden for money on account, we are of opinion that an appropriation was made, by consent of Alden, to the balance due at the time the mortgages were taken ; and that by agreement of the parties, the subsequent payments were appropriated to the reduction of the account for articles furnished after the mortgages were made.

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With these views of the trustee's answer, we do not think it necessary to discuss the law relating to the appropriation of payments, but are of opinion that the trustee should be discharged.

JEREMIAH GOULD vs. ABIGAIL GOULD & another.

The court has no jurisdiction in equity in cases of mere mistake.

A. died intestate, leaving B. a son, and C. a daughter, his only lawful heirs, and D. an elder illegitimate son, who had always been recognized by A. as a lawful child, and had lived in A.'s family during his minority, and whose illegitimacy was not known nor suspected by the lawful heirs, nor shown to have been known by himself: D. claimed one third of A.'s real estate, and gave to B. a quitclaim deed of all his interest in the estate; for which B. gave him a promissory note: After D.'s death, B. took up the note, and gave one payable to D.'s widow, who was his executrix and residuary legatee, and afterwards paid that note, in part, by transferring to the widow a note of J. which was payable to B.: J. afterwards took up that note and gave one to the widow, payable to herself: B. subsequently discovered the illegitimacy of D., and filed a bill in equity against the widow of J., praying for a decree that the widow had no right in the last mentioned note, and that J. should pay the amount thereof to B., and that the widow should give up the note to be cancelled.

Held, that all the transactions set forth in the bill were founded on mistake; that no trust arose therefrom in favor of B., of which cognizance could be taken under the Rev. Sta. c. 81; and that the bill must be dismissed for want of jurisdiction of the matter thereof.

THIS was a bill in equity, in which the plaintiff alleged that he and one sister were the sole heirs of their father, who died intestate, in February 1832: That a son of the plaintiff's father and mother, who was born before their marriage, was acknowledged by them as a lawful child, and always lived with them until 1813, when he was twenty one years old: That in April 1832, the sister of the plaintiff conveyed to him all her title to her father's real estate: That the son aforesaid "assumed to own one third of said real estate; and the plaintiff, not knowing or suspecting otherwise," took from him, on the 1st of March 1832, a conveyance, by quitclaim deed, of his inheritance in said estate, and gave him, as a consideration for such conveyance, a promissory note for \$600: That the plaintiff, on the 21st of the same March, paid \$100 on said note: That on the 1st of April 1833, the balance on said note was \$532.85, and on the same day there was justly due from the plaintiff to said son, of

other dealings, \$217·15, which sum was settled, and the plaintiff thereupon took up the said note, and gave to said son a new note for \$750, which was partly paid by the plaintiff, and cancelled, on the 1st of April 1834, and a new note given to said son for \$700: That said son died testate, on the 10th of November 1834, leaving his widow, Abigail Gould, one of the defendants, and three daughters, and by his will (which was duly proved and allowed soon after his death) gave \$100 to each of his daughters, and the residue of his property, which was wholly personal, to said Abigail, after paying his debts: That said Abigail was executrix of his will, and administered as such; and that the residue of said property, after payment of the debts and the legacies to the daughters, was \$2000: That the plaintiff, on the 1st of April 1835, paid to said Abigail the interest on said note for \$700, and on the 1st of April 1836, again paid to her the interest thereon, and then took up said note, and gave a new note for \$700, payable to her or her order, on which the plaintiff paid a year's interest in April 1837: That on the 1st of October 1838, Charles Johnson, the other defendant, owed the plaintiff a note of \$500, which the plaintiff then transferred to said Abigail, and also paid her \$20 in money; and she thereupon indorsed \$520 upon the note for \$700, which she held, as aforesaid, against the plaintiff: She also gave up to said Johnson the note so transferred to her by the plaintiff, and took from said Johnson a new note for \$500, payable to herself, which she still holds: That in April 1839, the plaintiff paid to said Abigail, on the last named \$700 note, \$31·65, and thereupon took up the same and gave her a new note for \$200, which she still holds, and on which no payment has been made.

The plaintiff alleged that the original note for \$600, given as a consideration for the conveyance above mentioned, was voidable for want or for failure of consideration, and for mistake of the rights of the plaintiff and of the said son, the payee of said note, and might have been avoided in the life time of the payee: That the \$217·15, which was a partial good consideration for the aforesaid \$750 note, had been fully paid, with interest, before said Johnson's note aforesaid was transferred to said Abi-

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gail ; and that the amount of said Johnson's note, and interest from its date, and the amount of said \$ 200 note, now held by said Abigail, are both not equal to the original \$ 600 note, and interest thereon from its date : That the said notes now in the hands of said Abigail, as legatee under her husband's will, are liable to the same equity as if her husband were now alive and were the holder of said notes : That the plaintiff ought to have the amount of said Johnson's note to the widow, because his transfer of the note for which it was substituted is supported by no other consideration besides that of the \$ 600 note given by the plaintiff for the deed aforesaid, which conveyed no interest to him ; and that said Johnson was willing to pay his said note to whomsoever the court shall adjudge that it belongs.

The plaintiff further averred that he first discovered the said mistake in March 1840, and never, until that time, suspected that the son aforesaid was not a lawful heir of his father : That he has since requested said Abigail to surrender the said notes ; but that she has refused so to do.

The bill concluded with a prayer for a decree that said Abigail has no right in the Johnson note, but that the plaintiff has the right to the same ; and that Johnson, under the indemnity of the court, be decreed to pay to the plaintiff the amount due thereon ; and that said Abigail be required to deliver up the note to be cancelled. There was also a prayer for such other relief as equity requires.

The defendant, Abigail Gould, demurred to the bill, and assigned two causes of demurrer : 1st. Want of jurisdiction, in this court, of the case stated in the bill : 2d. Want of equity ; because the plaintiff is entitled neither to discovery nor relief.

B. R. Curtis, in support of the demurrer.

E. Ames, for the plaintiff.

WILDE, J. Admitting the facts stated in the bill, as they are admitted by the demurrer, we think it clear that the case is not within the equity jurisdiction of this court. The prayer for relief is founded on a pure mistake ; and this court has no jurisdiction in equity, in cases founded merely on mistake.

The plaintiff's counsel contends, that the mistake in this case,

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in connexion with the surrounding circumstances alleged, generated a trust, of which this court has jurisdiction. But all the circumstances and proceedings are founded in mistake ; and if a trust may be raised or implied, where money has been paid by mistake, or fraud, which the party receiving it cannot conscientiously withhold from another party ; such a constructive trust *in invitum* is distinguishable from an implied trust arising from the presumed intention of the parties, (2 Story on Eq. §§ 1255, 1256,) and is clearly not within the true meaning of the Rev. Sts. c. 81, § 8. If such trusts were within the statute, we must take jurisdiction of all cases, or most cases, of mistake or fraud ; which the legislature manifestly never intended to allow.

Then it was argued, that this bill may be supported on the ground that here are more than two parties interested, having distinct rights or interests which cannot be justly or definitively decided in one action at the common law. But this is not such a case. It is clear that Johnson is bound to pay his note to Abigail Gould, the promisee. The plaintiff's remedy, if he has any, is against her. But if Johnson has the right to compel the plaintiff and Abigail Gould to interplead, he alone can file a bill for that purpose. Whether he has such a right, or not, we give no opinion.

Bill dismissed with costs.

ELIZABETH ADAMS *vs.* THOMAS ADAMS & others.

Where a testator devised specific parts of his real estate to his wife, in fee, and bequeathed to her all his personal property, and ordered that the other part of his real estate should be disposed of as the law directs, and the wife accepted the devise and bequest made to her ; it was held that she was not entitled to dower in the other part of the real estate.

HUBBARD, J. This action is brought by the demandant to recover her dower in certain parcels of real estate in Quincy, of which her husband, Ebenezer Adams, died seized, and which are now in the possession of the tenants, as his heirs at law ; and she also demands damages for the detention thereof, agree-

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ably to the provision of the Rev. Sts. c. 102, § 3. It is admitted by the tenants, that she is entitled to judgment in her favor, unless she is precluded therefrom by certain devises and bequests made to her by her husband in his will, which has been proved and allowed. By the first clause in his will, he devised and bequeathed to the demandant certain specific portions of his real estate, (describing them in detail,) and his personal property, in the following words: "Also all my personal estate of every kind, wheresoever it may be found, that I may be possessed of at the time of my decease, after payment is made therefrom of my just debts, funeral charges and other necessary expenses. To have and to hold the same to her, her heirs, executors, administrators, and assigns, to their use, and behoof forever." Then followed these words: "The other part of my real estate is to be disposed of as the law directs."

The question which has been argued is, whether the demandant is entitled to dower in that other part of her husband's real estate, which is to be disposed of as the law directs.

By the Rev. Sts. c. 60, § 1, it is enacted that "every woman shall be entitled to her dower at common law, in the lands of her husband, to be assigned to her after his decease, unless she is lawfully barred thereof." But by § 11 of the same chapter, which is substantially a revision of the former St. of 1783, c. 24, § 8, it is enacted that "if any provision be made for a widow in the will of her husband, she shall, within six months after probate of the will, make her election, whether she will take such provision, or be endowed of his lands; but she shall not be entitled to both, unless it plainly appears, by the will, to have been the intention of the testator, that she should have such provision, in addition to her dower."

In this case, the demandant has accepted the provision made for her by the will, and now claims dower in the residue of the real estate of which the testator died seized.

As demandant, then, it is for her to make it plainly appear by the will, that in addition to the provision made for, and accepted by her, she is entitled to dower; and if it is left in doubt as to such intention, she cannot recover.

If no will had been made by the husband, she would have been entitled to her dower, and to one half of his personal estate ; he having died without issue. But the personal estate, thus given by law, would have been subject, with the residue of it, to the payment of debts. By the will, one half of the real estate, as it is agreed by the parties, is given to her in fee, and the whole of the personal estate. It is very clear then, that a much better provision was made for the demandant, than if her husband had died intestate. Such provision was made for her comfort during life, as he thought sufficient. He makes a specific devise to her in fee of real estate marked by metes and bounds with houses thereon, and does not give her merely an undivided portion of his estate. And in respect to that not devised, he says, "the other part of my real estate is to be disposed of as the law directs." Now the law does not direct, as a necessary provision, that she shall have dower in such residue, unless it plainly appears by the will itself, that it was the intention of the testator that she should have it. But it cannot, we think, be successfully contended, that having made such specific provision for her, he meant also to leave her something uncertain in the other portion of his estate — a dower estate, to be a cause of dispute with his brothers and sisters, and the subject of a lawsuit. The plain meaning of the words, taken in connexion with the preceding parts of the will, seems to me to be this : Having made a satisfactory provision for my wife, I now leave the residue to my heirs, to be disposed of as the law directs. Such a construction satisfies the will, without any labored endeavors to find reasons why he intended to carve out an estate in dower for his wife, in addition to his various bequests to her. On the whole, we are clearly of opinion that it was not the intention of the testator that his widow should be entitled to dower in his estate.

In conformity to the agreement of the parties, the demandant is to be nonsuit, with costs for the tenants.

Gourgas, for the demandant.

Kingsbury, for the tenants.

THOMAS ADAMS & others vs. LEMUEL BRACKETT, Executor

The will of a testator was thus: "I give, bequeath and devise to my wife the following described pieces of land," (particularly describing them:) "Also all my personal estate of every kind, wheresoever it may be found, which I may be possessed of at the time of my decease, after payment is made therefrom of my just debts, funeral charges and other necessary expenses. To have and to hold the same to her, her heirs, executors, administrators and assigns, to their use and behoof forever. The other part of my real estate is to be divided as the law directs:" The debts, &c. of the testator exceeded the value of his personal property. *Held*, that the real estate, devised to the wife, was not charged with the payment of his debts, &c. and that the undivided real estate should first be applied to the payment of the excess of the debts, &c. over the value of the personal property.

A husband subscribed for shares in the stock of a bank, and on paying the instalments, he stated that the shares were his wife's, and that she would have something to live upon, if he should spend all his property: He took receipts as for payments made by her, which payments were entered in the book of the bank, as made by the wife, and a certificate was issued to her, as owner of the shares: The husband afterwards purchased shares in the same bank, in his own name, and sometimes pledged the same to the bank as security for loans made to him, but never so pledged, nor proposed so to pledge, the shares that stood in his wife's name: He received dividends as long as he lived, on the shares that stood in his own name and on those that stood in the name of his wife, and always requested the cashier of the bank to give him the money in two distinct and separate sums; and he sometimes asked for particular kinds of money for his wife, in payment of the dividends on the shares that stood in her name. *Held*, on the husband's death, that the wife was entitled, as against his heirs at law, to hold the shares, that stood in her name, as her own property; there having been a gift thereof to her by her husband, valid as against all persons except his creditors, who might resort to the shares for payment of their debts, if he did not leave other property sufficient to pay them.

THIS was an appeal by the heirs of Ebenezer Adams, from a decree of the probate court, granting a license to the executor of his last will to sell so much of said testator's real estate which was not devised by his will, as should produce a sum sufficient to pay the excess of his debts over "the value of that part of his personal property, which was applicable to the payment thereof." Two reasons of appeal were assigned: 1st. Because there was sufficient personal estate for the payment of the debts, &c. unaccounted for by the executor of said deceased. 2d. Because the payment of the debts, &c. were charged upon the estate devised and bequeathed to Elizabeth Adams, widow of the deceased, in his will, which exempts therefrom the real estate which the executor is licensed by the said decree to sell.

The parties submitted to the court the following statement of facts, in reference to the first reason assigned by the appellants for their appeal: The testator was an original subscriber for six shares in the capital stock of the Quincy Stone Bank, and on the 1st of June 1836, he paid to the cashier of said bank \$ 300, the first instalment on said shares, and directed the cashier to make out a receipt to his wife, Elizabeth Adams — saying that the shares were hers, and that if he spent all his property, his wife would have something to live upon, if the bank should prosper. The cashier made out the receipt accordingly, and requested him to take another share, but he declined — saying he might perhaps conclude to take some for himself; and if he did, he should want more than one; but his wife did not want any more. On the 13th of August 1836, the testator went, with his wife, to the bank, and paid \$ 300, the second and final instalment on said shares; and the cashier, by the testator's direction, made out to his wife a certificate of six shares, in the usual form, delivered it to her, and took her receipt therefor. The payments of both instalments were entered, by the cashier, on the stock journal of the bank, as made by Elizabeth Adams.

The dividends on said shares were paid to the testator, during his life, and he signed receipts therefor, on the dividend book; for the first dividend, 'Ebenezer Adams, for Elizabeth Adams;' for the subsequent dividends, 'Ebenezer Adams.'

In April or May 1837, the testator purchased fifteen shares in said bank, in his own name, and a larger number afterwards, and at various times pledged those shares, or some of them, to the bank, as collateral security for money lent to him. But he never pledged, nor proposed to pledge, the six shares that stood in his wife's name. Sometimes, when he received a dividend on said six shares, he asked the cashier for new bills, and sometimes for gold pieces — saying it would please his wife to have them. He uniformly requested the cashier to give him the dividend upon his wife's shares, and upon his own shares, in two distinct and separate sums.

The appellants, in support of their second reason of appeal,

relied on that part of the will of the testator which is hereinafter set forth in the opinion of the court.

Kingsbury, for the appellants.

Gourgas, for the appellee.

HUBBARD, J. One subject, presented upon these reasons of appeal, arises out of the will of Ebenezer Adams, which we have had occasion in a previous case to consider, so far as it regarded the widow's claim for dower. *Ante*, 277. We are now called upon to determine whether the debts of the testator, which the appellee contends exceeded his personal estate,) are a specific charge on the real estate devised to the wife; or whether they are to be paid out of the real estate which descended to his heirs at law.

The will of the testator was thus: "I give, bequeath and devise to my wife, Elizabeth Adams, the following described pieces of land," [describing them severally:] "Also all my personal estate of every kind, wheresoever it may be found, that I may be possessed of at the time of my decease, after payment is made therefrom of my just debts, funeral charges, and other necessary expenses. To have and to hold the same to her, her heirs, executors, administrators and assigns, to their use and behoof forever. The other part of my real estate is to be disposed of as the law directs."

The appellants contend, that the devise to the wife, of the real and personal estate, is so blended and combined, that the same constitute one fund, and therefore what is a charge upon the one is a charge upon the other.

It has indeed been repeatedly decided, that where the two are thus blended, the real estate is equally chargeable with the debts as the personal. *Kidney v. Cousmaker*, 1 Ves. jr. 436. *Bench v. Biles*, 4 Mad. R. 187. *Hassanclever v. Tucker*, 2 Binn. 525. *Witman v. Norton*, 6 Binn. 395. In these cases, the intent to charge the real estate is necessarily inferred from its being blended with the personal; and in most of the cases where the rule is applied, the devise of the real and personal estate is contained in the same clause. And where the intent is thus manifest, there is no doubt that the burden is as much imposed on the real as on the personal estate.

In the case before us, however, the real and personal estate are not devised in one clause ; there is no blending or combining them together. Each devise is distinct and separate ; the last does not depend on the first for its construction or meaning ; and the intention to charge the real estate cannot be inferred as a necessary consequence which the court are bound to regard.

On the other hand, we are of opinion, from the language of the devise itself, the several descriptions of the real estate, and from the manner in which the payment of his debts is mentioned in connexion with the personal estate, that it was not his intention to charge the lands and tenements, devised to his wife, with any portion of his debts.

It has been urged, that the words "also" and "after," as used in the clause relating to the personal estate, express the intention of uniting the two devises together and making the real estate subject to the debts. If this reliance on single words in common use could be considered as availing the appellants ; with equal force, we think, the appellee might contend, that the word "therefrom" was appropriated to the personal estate, and would thus clearly express the intention of the testator.

But the case does not call upon us to give any peculiar force to these particular words, though we think them all capable, in themselves, of being applied to preceding clauses and subjects. Here the intention to charge the debts upon the personal estate being manifest by the distinct clause or paragraph, in which the personal estate is given, containing the direction to pay the debts, we are clearly of opinion that the real estate, which was not devised, but left to be disposed of as the law directs, must, after the personal estate is exhausted, be first applied to the payment of the debts, before the real estate, specifically devised to the widow, can be touched.

Another reason, stated for the appeal from the decree of the court of probate, why no part of the residue of the real estate of the testator, of which the appellants, as heirs at law, are now in possession, should be sold for the payment of debts, is, that the six shares in the Quincy Stone Bank, standing in the name of Elizabeth Adams, the testator's widow, are sufficient, without the other personal estate, to pay all the debts.

This gives rise to the question, whether the six bank shares are the separate property of the widow, or whether they are a portion of the testator's estate. The facts do not show whether the money, which was laid out in the purchase of these shares, was ever the separate property of the wife; and we cannot assume that as a fact, but in the absence of proof, take it for granted that these shares were purchased with the money of the husband, and given to the wife.

The rights of females in estates, both real and personal, accruing to them before and during coverture, have often come before this court; and since the principles of equity have been infused into our laws, by various statutes, the rigid rules of the common law have been in some degree relaxed, in respect to the capacity of married women to hold property separate from their husbands; so much so, that a learned judge, in giving a dissenting opinion in the case of *Phelps v. Phelps*, 20 Pick. 562, says that the case of *Stanwood v. Stanwood*, 17 Mass. 57, was not so strong as the one before him, and that, even in that case, the decision was contrary to the rules of the common law. But the case of *Stanwood v. Stanwood* has received the sanction of successive judges, and the principles there laid down are now too well established to be longer successfully questioned.

No case, that I am aware of, precisely like the one at bar in all the circumstances, has presented itself in our courts. But similar facts are stated by Jackson, J. in his very learned opinion in the case of *Draper v. Jackson*, 16 Mass. 482. He says, in considering the question before him, viz. whether a note and mortgage, made to a man and his wife during coverture, should go to the wife, or not, in the event of her surviving, "we except the case of a voluntary gift by the husband to his wife; as when he advances his own money or other property, and takes for it a note or bond to himself and wife. This, like every other voluntary conveyance, would, without doubt, be void as against the creditors of the husband." But here he does not consider such a gift as void in itself, but rather like other voluntary conveyances, which, it is well known, are good against the heirs at law of the grantor; or, if chattels, against his executors. And in the

recent case of *Phelps v. Phelps*, before referred to, Dewey, J. says, by the husband's consent, "she may become a party as grantee to a deed, or obligee to a bond, or payee to a promissory note ; and when thus made a party, new rights may be acquired by her. This may be effected by a contract made jointly with the husband and wife, or it may be by a contract with her alone ; and in either case, upon the survivorship of the wife, these interests, although accruing during coverture, will vest in her."

In these cases thus put, I see no reason why the husband may not furnish the consideration to the grantor of the deed, the obligor of the bond, or the maker of the note, for the benefit of his wife, using these parties as trustees, subject only to the claims of creditors.

In England it has been determined that, in equity, a gift from the husband to the wife is valid. *Slanning v. Style*, 3 P. W. 338. *Lucas v. Lucas*, 1 Atk. 270. In the case of *McLean v. Longlands*, 5 Ves. 79, Lord Alvanley says "nothing less would do than a clear irrevocable gift, either to some person as a trustee, or by some clear and distinct act of his, by which he divested himself of his property, and engaged to hold it as a trustee for the separate use of his wife." And in *Walter v. Hodge*, 2 Swanst. 106, Sir Thomas Plumer, in referring to the case of *Lucas v. Lucas*, says, "in the single case of £1000 south sea annuities, transferred by the husband into the name of his wife in his life time, the court thought that so decisive an act, as amounted to an agreement by the husband, that the property should become hers. That seems to come under the description stated by Lord Alvanley ; it is an act, a clear and distinct act, by which the husband divested himself of his property."

But the case at bar bears a very strong resemblance to that of *Stanwood v. Stanwood*, before referred to. And though its incipient stages were different, yet in principle we do not think it distinguishable from that case ; and to enforce a different decision here would be doing a great violence to the intentions of the husband, and to the equitable claims of the wife. The difference, in that case, consisted in the fact, that the bank shares, previous to the marriage, were the property of the wife.

The husband, however, received the dividends, and when the new bank was established and the shares were reduced, he subscribed for the new shares, in her name, while the balance in cash, which was paid, was passed to his credit. The declaration of his intention not to appropriate it to himself, alone led the court to decide that it was a disaffirmance of any property in himself. So here, in the case at bar, there was a clear and distinct act of the husband, divesting himself of the money necessary for the purchase of the shares, and making the same the property of his wife. The intention to give and the act of giving are complete ; and the dividends were afterwards received for her benefit.

We think, therefore, in the application of the principles in decided cases, this gift can be supported as against the claims of the heirs at law ; and that it may be considered as an appointment, on his part, of the wife, to receive the same to her own use.

If the proceeds of these shares were necessary for the payment of the debts of the testator, we are clearly of opinion that they would be held subject to such debts, and that the claims of creditors, in such a case, are paramount to those of the wife. But in the construction to be given to the will of the testator, it is manifest that he intended that his debts should be paid out of the undivided surplus of his real estate remaining at the time of his death. We are therefore of opinion, that the demand of the heirs, to have the bank shares sold for the payment of debts, cannot be supported. And in conformity to this opinion, the appeal is dismissed, and the case is to be remitted to the court of probate for further proceedings.

JACOB F. EATON vs. JAMES HALL.

Under the Rev. Sts. c. 82, § 12, exceptions may be alleged to the opinion, direction or judgment of the court of common pleas upon an award made under c. 114 of the same statutes: The provision, in § 13 of the latter chapter, for a writ of error in such case, is merely cumulative.

Where an award, made under the Rev. Sts. c. 114, is returned to the court of common pleas, although the original agreement of submission is not produced and filed, yet the court has jurisdiction of the award, and ought to take cognizance thereof, upon satisfactory evidence that an agreement of submission was signed, acknowledged and certified, conformably to the statute requisitions, and has been lost, and on proof of a copy thereof, or of its contents, so full and complete as to be substantially a copy.

IN November 1841, the parties in this case signed and acknowledged an agreement, according to the provisions of the Rev. Sts. c. 114, § 2, to refer all demands between them to the determination of three arbitrators named; and a justice of the peace subjoined to the agreement a certificate that the parties acknowledged before him that said instrument of agreement was their free act. This agreement or rule of submission was delivered to the arbitrators, who met and heard the parties, and signed, sealed up, and returned their award to the court of common pleas, at the December term 1841; but the agreement of submission was not found among the papers returned, and could not be found at all, although, (as appeared by affidavits filed in the case,) careful inquiry and search therefor had been made.

The award of the arbitrators was, "that there is justly due from said James Hall to said Jacob F. Eaton the sum of \$ 160, and that he recover judgment for the same accordingly, in full satisfaction of all demands between the parties. Costs and expenses to be equally divided between the parties."

The original agreement to enter into the submission was filed in the case by the plaintiff, and also "a true and substantial copy of the rule of submission, verified by the counsel of the said Eaton, who moved for judgment according to the award; the counsel of the said Hall objecting, because the original rule was not produced." The court of common pleas refused to receive the copy of the lost agreement of submission, or to render any judg-

Eaton v. Hall.

ment upon said award. Whereupon the said Eaton alleged exceptions.

D. A. Simmons, for the plaintiff.

Wilkinson, for the defendant.

SHAW, C. J. The first question is, whether this case properly comes before the court, by exceptions taken to the decision of the court of common pleas, in refusing to receive and act upon an award of referees, alleged to have been made under the authority of a justice's rule, pursuant to Rev. Sts. c. 114. It is not now a question of the competency or sufficiency of the evidence, but upon the jurisdiction of this court to inquire, upon exceptions taken and allowed, into the legality of the decision of the court below, in dismissing the application to receive and act upon the award. And we are of opinion that the case is properly brought before this court by exceptions.

It is true that by the Rev. Sts. c. 114, § 13, it is enacted that no appeal shall be allowed from any order or judgment of the court of common pleas upon any award, made under that chapter ; that is, by a justice's rule ; but that any party aggrieved may bring a writ of error. It may be remarked in passing, though not material to the present case, that it is at least questionable whether this provision, prohibiting an appeal, is not repealed by St. 1840, c. 87, the jurisdiction act, which provides that any party aggrieved by any judgment of the court of common pleas, founded on matter of law apparent upon the record, may appeal. If, therefore, the objection to an award is, that it is uncertain, not within the submission, or otherwise erroneous ; matter of law apparent on the record, it would seem that this provision gives a remedy by appeal ; and if so, *pro tanto* it repeals the provision in the revised statutes.*

The argument is, that the Rev. Sts. give a remedy by writ of error, for error either of fact or law, and therefore that exceptions do not lie. But we think this conclusion does not follow. That remedy is not declared exclusive, and there are no nega-

* In the case of *Skeels v. Chickering*, Essex county, November term, 1843, this point was decided, conformably to the intimation above given.

tive words. Then it appears to us, that the provision allowing exceptions is quite broad, and explicit enough to include this case, and that there is no incongruity in regarding them as concurrent remedies. The provision is, (Rev. Sts. c. 82, § 12,) that "any party, aggrieved by any opinion, direction or judgment of the court of common pleas, in matter of law, in any civil action, suit or proceeding whatever, whether it be according to the course of the common law, or otherwise, may allege exceptions." It is a prompt, simple and convenient remedy, less expensive and onerous than a writ of error, and there is nothing to indicate that the legislature did not intend that it should include the case of an award made under the statute. And yet it was highly proper to give an express remedy by writ of error, because, not being a proceeding according to the course of the common law, it might be otherwise doubtful whether error would lie; and yet a writ of error might be quite necessary in cases where the exceptions should not be seasonably taken and proceeded on.

When a rule is rightly entered into before a justice of the peace, under the statute, and an award is made, and a party presents it to the court of common pleas, that court has jurisdiction. If they reject it, when they ought to receive it, or receive it when they ought to reject it, it is an erroneous direction or judgment in matter of law, and a proper subject for exceptions. We think the case of *Dean v. Dean*, 2 Pick. 25, is not an authority opposed to this decision, because as the law then stood, this court had no authority, after deciding the question of law, to remand the cause to the court of common pleas; and this was the ground, on which that case was decided.

The case of *Endicott*, 24 Pick. 339, was also before the St. of 1835, c. 101, § 2, which greatly enlarged the power of this court, and which was followed by the revised statutes; and it was decided on the same ground with that of *Dean v. Dean*. But by the Rev. Sts. as well as St. 1835, c. 101, this court may remand the case to the court of common pleas for trial, &c and shall cause such other proceedings to be had in the case as to law and justice shall appertain.

We are then brought to the question arising upon the bill of exceptions. It appears that the court declined to take any cognizance of the cause, on the ground that the original rule of reference was not produced and filed. The question is, whether in point of law the court had jurisdiction of the award, upon satisfactory proof of an original rule entered into before a justice of the peace, and certified by him, conformably to the provisions of the statute, and that it was laid before the referees and acted upon by them, without the production of the original, on satisfactory proof of the loss of such original, and proof of a copy, or of the contents so full and complete, as to be substantially a copy.

The court are of opinion, that the evidence was competent and ought to have been received, and if the court were satisfied with the proof that the rule was entered into, and the original lost, that the court had jurisdiction.

In *Petrie v. Benfield*, 3 T. R. 476, in a penal action, where the original bill was lost, or taken off the file, the court permitted it to be supplied by a copy taken by the attorney. In *Jones v. Fales*, 5 Mass. 101, the contents of lost notes were allowed to be proved by parol, on proof of loss of the originals. One reason assigned was, that the originals were left in the custody of the court. In the present case, the original rule was necessarily placed in the custody of the arbitrators, as their authority for proceeding. In *Sturtevant v. Robinson*, 18 Pick. 175, the contents of a lost writ of *scire facias* were allowed to be proved, though it was the foundation of the jurisdiction of the court against the trustee. In *Pruden v. Alden*, 23 Pick. 184, a license to an administrator, to sell real estate, granted by the court of common pleas, though it must have been matter of record, was allowed to be proved by parol, on evidence of loss of the records, although there, the petition, thus proved by parol, must have been the foundation of the jurisdiction of the court of common pleas, as the rule of submission was in the present case.

It appears to us, that the consideration, that a particular written document constitutes the basis of the jurisdiction of a court,

does not essentially vary the rule in regard to secondary evidence, though it may require more care and vigilance in its application. It is the fact, that a rule was entered into, and authenticated by the act of the magistrate, pursuant to the statute, with an award made upon it, which gives the court jurisdiction. The ordinary proof of this fact is the production of the rule. But we see no reason to take this out of the operation of the rule, which dispenses with the original, and allows of secondary evidence, on proof of its loss. One consideration, already alluded to, seems to favor the application of the rule to such cases, which is this ; that the paper is an official document, not in the custody of the party interested to preserve it safely, but officially in the custody of the arbitrators.

The court are therefore of opinion, that the court of common pleas erred in declining to take cognizance of the cause upon the evidence offered ; but, on the contrary, if it was proved to their satisfaction, that the rule had been entered into in due form of law, and an award made under it, although the original was not produced, but the fact, and a copy, or a substantial copy of the rule was proved by other evidence — satisfactory proof of the loss of the original being first given — that the court had jurisdiction of the cause, in the same manner as if the original rule had been produced. And the order of the court is, that the cause be remanded to the court of common pleas, with directions to receive and consider such proof of loss and the secondary evidence ; and if the rule and contents are proved to their satisfaction, then to proceed and adjudicate on the award.

JOSEPH HAYNES vs. OBADIAH JONES.

A. conveyed land to B. merely for the purpose of enabling B. to convey the same to C., and B. conveyed the same to C. accordingly: Before the deeds from A. to B. and from B. to C. were recorded, D. attached the land as the property of B., and subsequently levied an execution thereon. *Held*, that B. had no attachable interest in the land, after he had conveyed it to C., and that D. could not hold the land against C.

WRIT of entry to recover a tract of land in Randolph. The case was submitted to the court on the following facts: On the 18th of April 1834, E. H. Derby owned the demanded premises, and conveyed the same to Charles McIntire, a broker, who *made* a deed thereof, on the same day, and *executed* it on the next day, conveying the said premises to Jones, the tenant. This conveyance was made by McIntire for Derby; Derby having conveyed the premises to McIntire solely for the purpose of enabling him to convey the same to said Jones, in fulfilment of a previous agreement. When said conveyance was made to the tenant, the deed from Derby to McIntire was given up to him, but it was not recorded until the 19th of December 1837, on which day the tenant caused that deed and the deed from McIntire to himself to be recorded.

The tenant took possession of the demanded premises, immediately after they were conveyed to him by McIntire, and has ever since remained in possession thereof.

On the 17th of October 1837, the demandant caused all the real estate of said McIntire to be attached on a writ returnable to the court of common pleas in the county of Suffolk, and on the 3d of February 1840, recovered judgment against him, and took out execution and levied the same, within thirty days, in due legal form, on the demanded premises.

Brigham, for the demandant.

Wilkinson, for the tenant.

DEWEY, J. The demandant, a judgment creditor of Charles McIntire, has levied upon the demanded premises, claiming to hold them, upon the ground that there was an attachable legal interest in McIntire. For reasons which do not appear, and

which are in no wise material to the present question, the tenant Jones, instead of taking a conveyance directly from E. H. Derby, the owner of the land, received his title through McIntire. Derby conveyed by deed to McIntire, and McIntire, really a mere conduit, conveyed by deed to Jones. Both these latter deeds were unrecorded at the time of the demandant's attachment.

The demandant insists that the conveyance from McIntire to Jones, although prior to his attachment, is unavailing to the tenant, inasmuch as our statutes give no effect to an unrecorded deed, except as between the grantor and his heirs, and the grantee, or as respects persons having notice of such conveyance. To this it is answered, that McIntire had only an instantaneous seizin, and therefore no attachable interest. If this was well established by the facts, it might have been a good answer. But we apprehend that, upon the facts stated, it would be extending the principle too far, to apply it to the present case.

The stronger ground for the tenant is this ; that the effect of all the conveyances was such as to leave no attachable interest in McIntire. The legal estate, as evidenced by the registry of deeds, was in Derby, at the time of the attachment ; and an attachment by a creditor of Derby might have been sustained, upon the ground taken by the demandant, viz., that Derby having the record title, his deed to McIntire, not being recorded, would not defeat the attachment. I do not see but this would be unanswerable. But McIntire never had any possession, never had any title by record, and was a mere conduit to pass the title to others. It is true that a deed was executed, conveying the premises to him, and it is also true that he, on the next day, transferred to Jones the same estate. Whatever title McIntire acquired, he had parted with by the same form of conveyance, and which was, in all respects, as effectual to transmit his title to Jones, as was Derby's deed to him. It seems to us that the effect of this was to divest McIntire of any attachable interest ; that having had no possession of the land, nor any claim of title under any recorded deed, it was sufficient to defeat the demandant's attachment, that he had previously

transferred to the tenant whatever title he had, although by an unrecorded deed.

Demandant nonsuit.

ELLIS AMES vs. EDWIN WENTWORTH.

Where a creditor attaches his debtor's property on meane process, and seizes the same on execution, within thirty days after he recovers judgment, he has a lien or security on the property, which cannot be annulled, destroyed or impaired by his debtor being decreed a bankrupt, under the United States bankrupt act of 1841, on a petition filed after such seizure of the property, though before the time when, by law, it could be sold on execution.

THIS was a bill in equity, brought by the assignee of Jacob Shepard, a bankrupt, to redeem mortgaged real estate. The facts, as agreed by the parties, were as follows: On the 14th of April 1834, said Jacob Shepard mortgaged the estate in question to Elijah Drake, to secure payment of \$ 350. On the 4th of April 1842, Isaac R. Shepard, a creditor of said Jacob, commenced a suit against him, attached his right of redeeming said estate, recovered judgment against him on the 7th of May 1842, and took out execution upon the judgment, on the 11th of said May. On the 4th of June following, an officer "seized and took on said execution the right of redeeming said estate from said Drake's mortgage, and on the same day gave the required notices of time and place of sale thereof." All legal formalities were afterwards complied with, and after one adjournment of the sale, said right of redemption was sold, for \$ 430, to the defendant, who paid that sum to the officer therefor, and received from him a deed thereof, in due form, and caused it to be immediately recorded in the registry of deeds.

On the 28th of May 1842, said Jacob Shepard drew up his petition, with proper schedules of his property and debts, and made oath to the same before a commissioner in bankruptcy, and in all respects completed his petition. On the 7th of June following, he filed his said petition in the district court of the United States, and took an order of notice thereon, which was published, on the 6th of August 1842, in a newspaper, as was

directed by said court ; and such proceedings were afterwards had, that on the first Tuesday of September 1842, said Shepard was duly declared a bankrupt, and the plaintiff was appointed his assignee, and had license from said district court to redeem said mortgaged estate.

By consent of the parties to this bill, an interlocutory decree was passed, and an order of reference to a master. The master allowed the principal and interest due on the mortgage to Drake, and a small sum which the defendant had paid for an assignment of that mortgage for the purpose of protecting his title, and rejected the claim of the defendant to said sum of \$ 430 and interest thereon — on the ground that the sale of said right of redemption was void, and that the officer's deed thereof conveyed no right or interest in the mortgaged estate.

The defendant excepted to the master's rejection of said sum of \$ 430 and interest thereon, and appealed to this court.

The only question raised in this case was, whether Isaac R. Shepard had, at the time of the filing of the bankrupt's petition, a *lien* or *security* on the aforesaid equity of redemption, within the meaning of the second section of the United States bankrupt act of 1841, by which it is provided "that nothing in this act contained shall be construed to annul, destroy or impair any liens, mortgages or other securities on property, real or personal, which may be valid by the laws of the States respectively "

Wilkinson, for the defendant.

Ames, pro se.

The opinion of the court was delivered at the February term 1843, by

DEWEY, J. The point here raised involves the question of the effect of proceedings in bankruptcy, under the United States bankrupt act of 1841, upon the property of the bankrupt, which had, previous to the filing of his petition, been attached on mesne process, and where the suit had proceeded to judgment, and an execution had issued thereon and been levied on the attached property, but no sale thereof had been made, because the time had not elapsed, which must by law intervene between the seizure and the sale on execution.

It will at once be perceived that the case is quite clear of the principal question that arose in *Foster's case*, before Mr. Justice Story, in the circuit court of the United States, and is reported in 5 Law Reporter, 55, where the general subject of lien was elaborately considered, as well as the more limited question of the effect to be given to an attachment on mesne process, when bankruptcy intervenes before the rendition of any judgment in the suit in which such attachment is made. It was the latter question that was directly in issue in that case; and we have the most satisfactory evidence, from the opinion of the same learned judge, in subsequent cases, that his ruling in *Foster's case* was not intended to embrace all cases of attachments, without any reference to the state of the suit, or to the question whether the defence of bankruptcy might be interposed in the action, and the attachment be thus indirectly defeated.

Thus, in *Parker's case*, 5 Law Reporter, 351, where an attempt was made to apply the principle that an attachment was necessarily dissolved by a decree of bankruptcy, the same judge ruled, that no such effect would follow, where, pending the action, the amount of damages had been ascertained by agreement of parties, and a stipulation entered into for judgment to be entered at a future day, for a sum stated, and where it was the obvious intent of the parties that the attachment should continue as security for the judgment. The decision in *Foster's case* was there restricted, and the distinction taken between the case of a mere naked attachment, where there was no admitted debt due, no stipulation for judgment at a future day, and nothing in the state of the action which would prevent the bankrupt from pleading his discharge in bar of the suit, and a case presenting itself under circumstances like that then before the court; and while the former was held not to constitute a lien, within the saving clause of the second section of the United States bankrupt act; (St. 1841, c. 9;) a different rule was applied in the latter case, and the attachment was sustained.

In *Cook's case*, 5 Law Reporter, 443, this subject was subsequently considered by Mr. Justice Story, and was placed by him on grounds so distinct, that his views, in the opinion given

in *Foster's case*, can no longer be a matter of doubt or uncertainty. In *Cook's case*, there was an attachment on mesne process, and judgment subsequently rendered on default, and a petition in bankruptcy filed on the next day after the rendition of the judgment, and previous to the levy of execution; and the question was, whether the attachment was thereby defeated. The facts presented the question, which we have now before us, more directly than it was presented in *Parker's case*, where the decision was placed more upon the effect of the various stipulations of the parties to the suit — the bankruptcy being held not to annul or control them, though it took place before any enforcement of the lien or the issuing of an execution. But in *Cook's case*, no stipulation existed between creditor and debtor, as to the judgment, and the whole proceedings were *in invitum*, and therefore it presented, directly, the question of the right of an attaching creditor, who had obtained judgment, but had not levied execution, before the filing of a petition in bankruptcy by the debtor. Here, it will be perceived, the property had not passed to the creditor, and he had no other claim than that of a lien as security for his judgment. Upon the question thus presented, Story, J. said, "the proceedings in bankruptcy after judgment can have no effect whatsoever upon the judgment, or upon the property attached in the suit. The creditors of the judgment have made their right, (call it, if you please, their lien,) perfect under the attachment. It is no longer a conditional or contingent right, but it has attached absolutely to the property; and by the laws of Massachusetts it remains a fixed and positive lien for thirty days after the judgment."

That case, it will be seen, entirely settles the case at bar, if we adopt the principles of it. In that case, there had been only the rendition of judgment, but no levy of execution. In the case at bar, not only was judgment rendered, but it had been followed by an actual seizure of the property on execution. There can be no doubt, therefore, that in the present case the lien by attachment and seizure on execution was not defeated by the filing of a petition in bankruptcy, praying to be declared a bankrupt but the judgment creditor was well warranted in pro-

ceeding to sell the right in equity of Jacob Shepard in the premises attached on mesne process ; and that sale having been made in the form and manner prescribed by law, the purchaser acquired thereby a valid interest therein, and is entitled to receive the amount so accruing to him as purchaser of the equity of redemption, before he can be required to release to the assignee of said Shepard his interest in said mortgaged premises.

To avoid any misapprehension as to the extent of this opinion, it may be proper to remark that the court intend to express no opinion on the question whether a mere attachment would constitute a lien, within the saving clause of the bankrupt law. The present case does not require any adjudication on that point.

JOSHUA W. BLANCHARD vs. CHARLES STEARNS, Jr. & others.

An action may be maintained against selectmen for refusing to receive the vote of a qualified voter, or for omitting to put his name on the list of voters, without proof of malice. The *St.* of 1822, c. 104, and Rev. *Sts.* c. 3, made no change in the law on this point.

But, in order to maintain such action, it must be shown that the plaintiff furnished the defendants with sufficient evidence of his having the legal qualifications of a voter, and requested them to insert his name on the list of voters, before the defendants refused to receive his vote, or omitted to insert his name on such list.

And in such action, the declaration must aver, specifically, all the facts which constituted the plaintiff's qualifications to vote at the meeting at which his vote was refused, and that he, before offering his vote, furnished the defendants with sufficient evidence of his having those qualifications.

THIS was an action against the selectmen of the town of Brookline for refusing to put the plaintiff's name on the list of voters of that town, and for refusing to receive his vote, at the election of governor, &c. in November 1840. Defence, that the plaintiff was not a qualified voter in that town, at that time. Trial in the court of common pleas.

The following is the report of the case, as drawn up by the judge before whom it was tried : " There was no evidence introduced tending to prove that the defendants acted corruptly or unaliciously ; or that the refusal to put the plaintiff's name on the

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list of voters, or to receive his vote, was wilfully done or knowingly wrong ; or that the defendants were actuated by improper motives, or that they acted contrary to their own conviction. There was conflicting testimony as to the plaintiff's legal right to vote, or to have his name placed on the list of voters , and there was evidence tending to show that the defendants had carefully considered the subject, before they refused to place his name on the voting list and to receive his vote, and had taken more than usual pains to inform themselves upon the subject, by consulting counsel, &c. in order to decide rightly, and arrive at a correct result.

“ Upon these facts and this evidence, the court instructed the jury, that if they should be satisfied that the plaintiff was legally entitled to vote, and to have his name put on the voting list, at the time aforesaid, they must find the defendants guilty, notwithstanding they acted according to their honest conviction of their duty and of the legal rights of the plaintiff, and not corruptly or wilfully, or with improper motives, or knowingly wrong ; and that the defendants were liable even for an honest error of judgment in these particulars.”

The jury returned a verdict for the plaintiff ; whereupon the defendants alleged exceptions to the instructions of the court.

B. R. Curtis & Clarke, for the defendants.

Hallett, for the plaintiff.

The opinion of the court was made known at the October term 1843, by

SHAW, C. J.* The court have regarded the present as a very important question, deeply affecting, on the one hand, the rights of all those claiming the privilege of voting in the election of public officers, and on the other, the safety and security of those, who are called, by their official duty, to preside at popular elections, and to decide on the qualifications of voters. Whilst it is essential, as well to the true theory and principles of representative government, as to the just rights both of electors and candidates, that no unnecessary obstruction be thrown in the

* *Hubbard*, J having been of counsel, did not sit in this case.

way of the exercise of his just right of suffrage by the qualified voter, it is equally essential that the faithful and conscientious officer should be upheld and encouraged in rejecting the claim of any unqualified person, who may attempt to usurp that valuable privilege.

It has been argued in the present case, that no action ought in principle to be maintainable against public officers, who are required, in behalf of the community, to preside at elections and decide on the qualifications of electors, and whose functions are, in this respect, to some extent judicial, for refusing to receive a vote, or refusing to place the name of a claimant on the list of voters, without averring and proving that such refusal was malicious and wilful; by which is to be understood, from bad motives, and contrary to his own honest conviction. But although much may be said in favor of such a rule of law, and although such is the rule in England and most of the States of this Union, yet we consider the law of Massachusetts to be settled otherwise, by a series of decisions. *Kilham v. Ward*, 2 Mass. 236. *Lincoln v. Hapgood*, 11 Mass. 350. *Henshaw v. Foster*, 9 Pick. 312.

The same rule was recognized, rather than adjudged, in the case of *Capen v. Foster*, 12 Pick. 485. That action, however, proceeded upon very different grounds. It was an action against the warden and inspectors of a ward of the city of Boston, who are mere executive officers, having no authority vested in them to decide on, or inquire into, the qualifications of voters. The case therefore did not render it necessary to consider, whether the *St.* of 1822, c. 104, § 4, made any change in the former provisions of law, which allowed an action against selectmen, who are made judges of the qualifications of voters, for refusing to allow a claimant's right to vote, without averment and proof that such refusal was wilful and malicious. That case, therefore, though decided since the statute was passed, has no direct bearing upon the present.

The decision of the present case depends upon Rev. Stat. c. 3, § 9, following substantially, if not in all respects, the provisions of the *St.* of 1822. These provisions have, to some ex-

tent, altered the law upon this subject. They still assume the principle, that selectmen may be liable in a civil action for damages, for refusing to permit a person to vote, who is legally qualified ; and that without proof of malice, or any wilful and corrupt purpose. But they establish several prerequisites, to be observed by all persons claiming the right to vote, which, without in the least impairing the rights of qualified voters, may contribute considerably to the protection and security of those selectmen, who intend to act with honesty, fidelity and firmness, in the discharge of their responsible duties. Formerly, all that was requisite to be averred and proved, in order to maintain the action, was, that the plaintiff had a legal right to vote, that he requested to have his name put upon the list of voters, and tendered his vote, and that the selectmen declined putting his name upon the list, and refused to receive his vote.

But the provision of the Rev. Sts. c. 3, § 9, is, that the selectmen shall not be held answerable for any omissions in said list of voters, nor for refusing the vote of any person, whose name is not borne thereon, unless the person whose name may have been so omitted, shall, before offering his vote, furnish them with sufficient evidence of his having the legal qualifications of a voter, and shall have requested them to insert his name on said list.

The first section of the same chapter declares what those qualifications are ; for though the qualifications for voters for some of the officers of state are prescribed by the constitution, and cannot therefore be altered or modified by law ; and though these qualifications for voters for governor, senators and representatives, were different from each other, under our constitution as first framed and adopted, yet by the amendment made by the convention of 1820, these qualifications were made uniform for all these officers ; and by the St. of 1822, soon afterwards passed, and continued by the revised statutes, the same qualifications were fixed for voters for other officers, where they were not fixed by the constitution ; so as to have one uniform rule for all cases. These qualifications are thus declared by Rev. Sts. c. 3, § 1 : " Every male citizen of twenty one years of age and

upwards, (except paupers and persons under guardianship,) who shall have resided within the State one year, and within the town, in which he may claim a right to vote, six months next preceding any election of town, county or state officers, or of representative to congress, and who shall have paid, by himself, or his parent, master or guardian, any state or county tax, which shall, within two years next preceding such election, have been assessed upon him, in any town of this State, shall have a right to vote in all such elections." This statement of qualifications is in exact accordance with the Amendments of the Constitution of 1820, art. 3.

Recurring then to § 9 of the same chapter, which declares that selectmen shall not be answerable, but in certain specified cases, it is necessary for a plaintiff, in order to maintain such an action—according to the well known rules of pleading, applicable to declarations—to aver specifically all the facts necessary to show that his case is within the statute. He must now therefore aver, not only in general terms, that he was a legal voter, but the facts, which constituted him a legal voter; as that he was twenty one years of age and upwards, that he had resided within the State, at some place named, (or several places, as the case may be,) one year next preceding, and within the town, six months next preceding; that he had paid a tax, or that a tax had been paid for him, which had been assessed upon him, within two years next preceding; stating in what town the same had been so assessed, and whether paid by himself, or by another, as the case may be; and if by another, by whom, naming the person, and in what capacity; and more especially, that before offering his vote, and at a meeting of the selectmen, held for that purpose, he had *furnished* the selectmen with *sufficient evidence* of his having these qualifications.

The issue therefore is, not upon the fact of his having been duly qualified, and having a right to vote; but upon the fact of his having produced and seasonably submitted to the selectmen sufficient proof of that right. The law thus, as it should do, imposes upon the claimant the duty of preparing and exhibiting the evidence of his title; and it imposes upon selectmen the

duty of coming to a just and reasonable decision upon those proofs ; and the question will be for the jury, upon such issue, whether the claimant, whose vote was rejected, was at the time possessed of the qualifications entitling him to vote ; whether he seasonably submitted the proof of those qualifications to the selectmen, and requested his name to be placed on the list ; and whether those proofs were sufficient to warrant and require them so to do. We do not mean to say that the proof must be such as shall be satisfactory to the selectmen, to whom it is submitted ; because, if it were so, and still they refused to allow the applicant's claim to vote, it would be against their own conviction of right, and equivalent to a wilful and malicious rejection of a voter's claim. But it must be such proof as a jury may now say was reasonably sufficient to satisfy men of fair and impartial minds, and which ought to have induced the selectmen, in the particular case, to allow the applicant's name to be placed on the list.

And it follows as a necessary consequence from this view, that the plaintiff in such action will not be permitted to offer proof to the jury, in support of his title, which he did not lay before the selectmen, when he made his claim. The question is not, whether it now appears that he had a right to vote ; but whether he offered proof of it, at the time. And this proof should be reasonably satisfactory, and not such as leaves the question in doubt.

Some of the requisite facts, constituting the qualifications of a voter, are simple in their nature, and in general may be easily proved ; as the age and citizenship of the claimant, the assessment of a tax upon him, in some town of the Commonwealth, within two years, and the payment of such tax, by himself, his parent, master or guardian. But the question of residence, within the State, one year, and within the town, six months, may be, and often is, one of considerable difficulty. It is often indeed, and perhaps in the majority of cases, as simple and easy of proof as the others ; as where a person was born and has lived all his life, in one town, or, for a long term of years, had a fixed abode in one place. The term "resident" and "in-

habitant," in this sense, are equivalent, and are so declared by the Rev. Sts. c. 2, § 6, clause 7th. Both terms indicate the place of one's home or dwelling place, which depends on the common law doctrine of domicil. The constitution has attempted to give a definition upon the subject, as follows : "And to remove all doubts, concerning the meaning of the word 'inhabitant,' in this constitution, every person shall be considered as an inhabitant, for the purpose of electing and being elected into any office or place within this State, in that town, district, or plantation, where he dwelleth, or hath his home." This provision was avowedly intended to remove all doubt, and seems to be precise and accurate ; but for practical purposes, it leaves the point nearly in the same uncertainty as before, upon the question of fact, as to what is the place of one's home or domicil. In many, indeed in most cases, the question of domicil, or residence, will depend upon a few simple and decisive facts ; but in others, the evidence is so strong in regard to two or more different places, that a slight circumstance will turn the balance. *Lyman v. Fiske*, 17 Pick. 231. *Thorndike v. Boston*, 1 Met. 242. *Sears v. Boston*, 1 Met. 250. But in all cases, it is a question of fact, to be decided upon evidence. The presumption, in the absence of proof, is, that the selectmen decided right ; and this presumption will stand till the contrary appears. This presumption applies in favor of selectmen, as well to the correctness of their decision on the subject of residence, as of age, citizenship, and the assessment and payment of taxes ; and it is a presumption entitled to greater consideration in doubtful cases of domicil, where very competent judges might well think differently in regard to the preponderance of the evidence, and very honestly come to opposite conclusions, upon the same statement of facts.

Applying these rules and principles to the present case, the question is, whether the direction, given by the learned judge of the court of common pleas, at the trial, was correct in point of law. It is very clear from the bill of exceptions, that there was no evidence to show that the defendants acted maliciously, or decided hastily, or without due consideration. On the con-

trary, it appears that they took more than usual pains to inform themselves on the subject. It furthermore appears that there was conflicting testimony upon the plaintiff's right to vote, or to have his name placed on the list of voters. Upon this evidence, the court instructed the jury, that if they should be satisfied that the plaintiff was legally entitled to vote, and to have his name put on the voting list, at the time aforesaid, they must find the defendants guilty, notwithstanding they acted according to their honest conviction of their duty, and of the legal rights of the plaintiff, and not corruptly or wilfully, or with improper motives, or knowingly wrong, and were liable even for an honest error of judgment in these particulars.

The court are of opinion that these instructions cannot be supported. The question seems to have been left to the jury, solely upon the plaintiff's right to vote, as determined by the evidence offered at the trial, and not upon the evidence furnished to the selectmen, and the sufficiency of that evidence. For aught that appears, the evidence offered at the trial may have been much stronger than that furnished to the selectmen, before the meeting; and therefore the jury might have found, consistently with these instructions, that the plaintiff had now clearly proved his right to vote; and yet, had it been so left to them, they might have found that sufficient evidence of that right was not furnished to the selectmen before the meeting. The court are therefore of opinion, that the verdict must be set aside, and a new trial granted.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME JUDICIAL COURT
FOR THE
COUNTY OF ESSEX, NOVEMBER TERM 1842, AT
SALEM.

PRESENT :
HON. LEMUEL SHAW, CHIEF JUSTICE.
HON. CHARLES A. DEWEY, } JUSTICES.
HON. SAMUEL HUBBARD, }

ABIEL CHANDLER & others vs. JOSEPH E. SPRAGUE.

A. of Brazil, being indebted to P., H. & Co. of New York, was requested by them to make a remittance in discharge of his debt, and he thereupon shipped goods on board a vessel bound to Salem, on his own account and risk, and sent therewith bills of lading, by which the goods were made deliverable to his own order, and which were indorsed by him in blank, and enclosed to H. & Co. of New York (successors of P., H. & Co.) with authority to fill up the blank and make the goods deliverable to themselves, or to such person as they might name, with power to receive the proceeds in satisfaction of A.'s debt to P., H. & Co.: On the arrival of the vessel at Salem, the bills of lading were forwarded to H. & Co., who filled up the indorsement thereon by making the goods deliverable to C., H. & Co. of Boston, who were to pay duties and freight, dispose of the goods, and account for the proceeds thereof in payment of A.'s said debt: C., H. & Co. thereupon went to Salem, received the goods and entered them at the custom house, gave bond for the duties, and became responsible for the freight: While the goods were in their possession, the same were attached as the property of P., H. & Co.; whereupon C., H. & Co. brought an action of replevin against the attaching officer.

Held, that the property in the goods had not vested in P., H. & Co., and that C., H. & Co. were entitled to maintain their action.

THIS was an action of replevin, brought by Chandler, Howard & Co. of Boston, against the sheriff of this county, for taking and detaining 24 cases of India rubber shoes, and 470 al-

quiers of castana nuts. The defendant justified, and claimed to hold said goods under attachments thereof, as the property of Parker, Howard & Co., of New York, made by him on writs sued out against them by their creditors.

The trial was before the chief justice, and a verdict was returned for the plaintiffs, subject to the decision of the whole court upon their right to maintain the action on the facts of the case. Those facts are sufficiently shown in the opinion of the court.

This case was argued at the last November term.

N. J. Lord, for the defendant.

Ward, for the plaintiffs.

SHAW, C. J. The question is, whether the legal property in these goods was in the plaintiffs, at the time they were attached as the property of Parker, Howard & Co. of New York. It seems to us, as we understand the facts, that the question is not a difficult one. It appears that James Campbell of Para, in Brazil, was indebted to said Parker, Howard & Co., and that upon their request that he would make them a remittance in discharge of his debt, he shipped the goods in question to this country; and the ultimate object of that shipment was, to pay the debt due to them. But the goods were not shipped to them, nor consigned to them. They were shipped by Campbell, on his own account and risk, by the brig Amethyst, to Salem, under bills of lading, making the goods deliverable to his own order, and indorsed by him in blank. The bills of lading were enclosed to Howard & Co. of New York, (the firm of Parker, Howard & Co. having been dissolved,) with authority to fill them up so as to make the goods thereby deliverable to themselves, or to such person as they might name, with authority to receive the proceeds in satisfaction of their debt. On the arrival of the goods and these documents, at Salem, the bill of lading was forwarded to Howard & Co. (who had succeeded to Parker, Howard & Co.), and was filled up by them, making the goods deliverable to the plaintiffs, who were to sell them, pay freight, duties and expenses, and account for the net proceeds, in payment of the shipper's debt to Parker, Howard & Co. The plaintiffs presented the bills of lading, at Salem.

and received the goods, became bound to pay the freight, and entered them at the custom house, and gave security for the duties ; after which the goods were attached by the defendant.

In the first place, we are of opinion that no property in these goods was vested in Parker, Howard & Co. Had they filled up the blank in the bills of lading, as they had authority to do, so as to make the goods deliverable to themselves, and accepted the consignment, then the property would have vested in them, as consignees, liable to account to the consignor.

Ordinarily, the name of a consignee is inserted ; and then such consignee, or his indorsee, may receive the goods and acquire a special property in them. Sometimes the shipper, or consignor, is himself named as consignee, and then the engagement of the ship owner or master is, to deliver them to him or his assigns. Sometimes no person is named, the name of the consignee being left blank, which is understood to import an engagement, on the part of the master, to deliver the goods to the person to whom the shipper or consignor shall order the delivery, or to the assignee of such person. Abbott on Ship. (4th Amer. ed.) 215.

Had Campbell originally shipped these goods and taken bills of lading, making them deliverable to the plaintiffs or their order, then according to the usage and custom of merchants, and the established principles of mercantile law, the property would have vested in the plaintiffs, and they might have maintained an action for it, in their own names, against the ship owner, or any other person. In such case, the consignee may confer an absolute and indefeasible right of property on a third person, by indorsement and delivery of the bills of lading. Abbott on Ship. 389. *Conard v. Atlantic Ins. Co.* 1 Pet. 445.

We consider the bill of lading, thus originally signed in blank, and subsequently filled up by the authority of the shipper, so as to make the goods deliverable to the plaintiffs, as having the same effect to vest the property in them, as if their names had been so inserted by the direction of the shipper, when it was filled up and signed by the master of the brig.

In *Sargent v. Morris*, 3 Barn. & Ald. 277, the bill of lading

was very peculiar, and it made the goods deliverable to the plaintiff, for the shippers. It was proved that the goods were sent for the account and at the risk of the shippers ; and it was held that an action against the ship owner, for damages, would not lie by such consignee. Mr. Justice Best cited with approbation *Evans v. Marlett*, 1 Ld. Raym. 271, where this distinction was taken : “ If goods by bill of lading are consigned to A., A. is the owner, and must bring the action against the master of the ship, if they are lost. But if the bill be special to be delivered to A. to the use of B., B. ought to bring the action.’

In *Dougal v. Kemble*, 3 Bing. 383, one parcel of the goods was shipped, under a bill of lading making them deliverable to the shippers’ own order, and their indorsement vested the property in the vendee. S. C. 11 Moore, 250.

But there is another view, which seems to us to lead to the same result. Suppose that Campbell was not, in strictness, the consignee of these goods, and that a mere formal indorsement would not have vested the property in the plaintiffs, as indorsees ; still the whole disposing power was in him. He had a right to direct the delivery of the property in any mode he might think fit ; and by sending the invoice and bills of lading to Howard & Co., and authorizing them to name the consignee, and by their naming the plaintiffs, that vested the property in them, as against the shipper and those claiming under him, and all others not claiming the goods as consignees, under a formal bill of lading. *Nathan v. Giles*, 5 Taunt. 558. 1 Pet. *ubi sup.*

But, supposing, for the sake of the argument, that the plaintiffs did not become consignees of these goods, by formal bills of lading, so that they could have maintained an action in their own names against the ship owner for the loss or non-delivery of the goods ; still the goods, by the authority of the owner, had been directed to be delivered to them, with authority to sell and pay over the proceeds ; the ship owner had recognized that authority, yielded to it, and delivered the goods to the plaintiffs ; they had received them, incurred expenses and charges, for freight, duties and storage, and acquired a right to sell them and earn their commission. Under these circumstances, they had a

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right of possession and special property in the goods, sufficient to enable them to maintain an action against a stranger. If the general property was not in them, it remained in Campbell, for whom they must be deemed agents. No bill of lading, invoice or document of any sort, ever transferred any property in the goods to Parker, Howard & Co., whose interest was in the net proceeds, not in the goods before sale. There was no interest in them, therefore, which could be reached by attachment, and the defendant, the sheriff, was a mere stranger.

Judgment on the verdict.

THE IPSWICH MANUFACTURING COMPANY *vs.* JONATHAN STORY, Executor.

One who had mortgaged land, to secure a debt due on bond, was appointed administrator of the estate of the mortgagee, and returned an inventory of his intestate's property, including therein the debt due from himself on the bond: He afterwards settled his first administration account, in which he charged himself with the amount of the personal estate returned in the inventory; and his second account, in which he charged himself with the balance of the first: Thereupon the probate court passed a decree, ordering him to distribute the balance of the account, remaining in his hands, among the heirs of the intestate.

Held, that by these proceedings, the debt due on the bond was paid; and that a subsequent assignment of the bond and mortgage, by the administrator, transferred to the assignee no interest in the land.

THIS was a writ of review, brought by the Ipswich Manufacturing Company, to reverse a judgment recovered against them by Jonathan Story, executor of the will of Elizabeth Cogswell, at the November term 1839. That judgment was rendered on a special writ of entry, commenced by said Elizabeth, in her life time, and prosecuted by her executor, after her decease; in which writ she demanded possession of certain parcels of real estate in Ipswich, by virtue of two distinct mortgages; on one of which she claimed as assignee thereof, and on the other, as original mortgagee. Plea, the general issue.

The trial, on the review, was before the chief justice, and a verdict was taken for the original demandant, the defendant in review, subject to be amended, or to be entered for the original

tenants, according to the opinion of the whole court on the judge's report of the evidence.

After the trial, it became unnecessary, by reason of other proceedings of the plaintiffs in review, for the court to give any opinion, in this case, as to the original demandant's right to recover judgment on the mortgage on which she claimed as original mortgagee. The facts, therefore, respecting that mortgage, are not noticed in the opinion of the court.

This case was argued at the last November term.

Fletcher & Perkins, for the defendant in review.

Choate & Homer, for the plaintiffs in review.

SHAW, C. J. The original action, of which this is a review, was a special writ of entry, prosecuted by the original demandant, as executor of the last will of Elizabeth Cogswell deceased, in his representative capacity, to foreclose a mortgage, upon which it is alleged money was due to his testatrix. Such action, when the facts are sufficient to maintain it, is given by the Rev. Sts. c. 65, § 11, which make a mortgage of real estate, not foreclosed by the mortgagee, or his assignee, in his life time, together with the debt due thereon, assets in the hands of his executor or administrator. But, as the right to bring a real action by the personal representative of the person last seized, is given by statute only, contrary to the general rule of law which vests real estate in the heir or devisee, the action will lie only in a case within the statute; that is, in a case where there is a subsisting mortgage, upon which money is due, and not foreclosed at the time of the decease of the mortgagee.

Several grounds of defence were taken; but the principal one, and the only one which it is now necessary to consider, is, that the original debt had been paid, and that nothing was due on the mortgage, when this action was brought.

The facts are briefly these: In December 1801, Joseph Farley, then seized of the demanded premises, mortgaged the same to Jonathan Cogswell, the father of his wife, to secure the payment of his bond for \$3000, in one year from date. The principal not being paid, interest was paid from time to time till December 1816. Cogswell died intestate in 1819, and Joseph

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Farley, the mortgagor, was duly appointed administrator of his estate. It appears by the proceedings in the probate office, that Farley, as such administrator, inventoried his own bond as part of the personal property of his intestate ; that he settled a first account in the probate office, on the first Tuesday of August 1820, in which he charged himself with the whole amount of the personal property in the inventory, including his own debt ; that on the first Tuesday of February 1821, he settled a second account, charging himself with the balance of his first account ; that on the same day, a probate decree was passed, ordering the balance of the personal estate to be distributed to the widow and heirs at law of the intestate ; the said Elizabeth Cogswell, as such widow, being entitled to one third part in the distribution.

The said Joseph Farley, as such administrator, executed an assignment of the said bond and mortgage to said Elizabeth Cogswell, on the 5th of August 1821, which was not recorded until April 1837 ; and it is by force of this assignment, that the original demandant, as executor of the will of Mrs. Cogswell, claimed. Upon these facts, the tenants contended, that when the obligor became the administrator of the mortgagee, charged himself with that debt in his administration account, as so much money collected ; and when, with his knowledge and without objection on his part, a decree of distribution was passed by the court, ordering the distribution of the balance in his hands, as of a liquidated amount reduced to money, and ready for distribution ; it was in fact and in law a payment of the debt, and left nothing due on the mortgage. This is the question for the consideration of the court.

A mortgage is a security for the payment of money, for which the creditor has a personal obligation in common form, and also a pledge of real estate ; and he may pursue either of these remedies — both being securities for one and the same debt — until the debt is paid ; and although one may be lost or barred, it does not destroy his right to pursue the other. *Thayer v. Mann*, 19 Pick. 535. Both remedies may be pursued, each in its own appropriate mode, until satisfaction is obtained, but no further.

It is not now necessary to consider the old rule, that a testator, by making a debtor his executor, released his debt. That rule has been qualified, to a great extent, in England, and has never been in force here. It is now understood, that when an executor or administrator was indebted to his testator or intestate, at the time of his decease, although the right of action cannot exist, because a man cannot sue himself, yet the debt is not considered as extinguished in any way, but rather to be accounted for as paid. In other words, the debt becomes, *primâ facie*, assets in the hands of the administrator or executor, to be accounted for and adjusted in probate account, as assets actually realized. *Wankford v. Wankford*, 1 Salk. 299. *Cheetham v. Ward*, 1 Bos. & Pul. 630. *Freakley v. Fox*, 9 Barn. & Cres. 130. *Winship v. Bass*, 12 Mass. 199. *Stevens v. Gaylord*, 11 Mass. 267. It proceeds upon the ground, that when the same hand is to pay and receive money, that which the law requires to be done shall be deemed to be done, and therefore that such debt due from the administrator shall be assets *de facto*, to be accounted for, in probate account. Such presumption would arise from the mere taking of administration. But it is greatly strengthened when the administrator enters the debt in the inventory, as a debt due from himself to the estate, charges himself with it in account, and assents to a decree, by which it is ordered to be distributed as money. It is a clear indication and an authoritative declaration of his intent to regard it as assets, and treat it as a debt collected. It is in truth the only mode, in which payment could be made. Nothing, perhaps, short of the actual cancelling of the bond, could be a stronger or more authoritative and official declaration of the fact, that the debt due from himself is henceforth to be regarded as assets received, equivalent to the actual collection of a debt due from a third person to the estate. When thus actually treated as assets, and distributed as such, it is of course a legal satisfaction and extinguishment of the debt, and, in legal effect, payment.

Perhaps the mere fact, that one has accepted letters of administration, would not so far be regarded as payment or extinguish-

ment of his debt due to the intestate, as to bar an action to be subsequently brought by an administrator *de bonis non*. In the case of *Winship v. Bass*, 12 Mass. 200, it is intimated that a determination of the executor to resist payment of such debt, until compelled by a judgment of court, may, in some cases, be deemed a sufficient cause for removing such executor. This certainly implies, that upon his removal, and the appointment of an administrator *de bonis non*, an action for his debt, due to the estate, may be brought. But it also intimates the case in which such proceedings may take place. It is when the executor denies his debt, and resists payment; that is, refuses to account for it as assets. But where he has in fact accounted for it as assets, and it stands so charged to him, and credited to the estate, without objection, it seems to us that it would be a conclusive bar to any action to be afterwards brought for the same debt, by an administrator *de bonis non*. *Stevens v. Gaylord*, 11 Mass. 256.

Perhaps, in such case, if the executor were to die or be removed, before any decree of distribution, or satisfaction of such decree, and it should turn out that though he had credited his debt as assets, yet that he had no means to pay and satisfy the amount due on his administration account, it might be held in equity, in favor of the sureties on his administration bond, that the mortgage, given to secure the same debt, should not be deemed to be discharged. But where the debt has been in fact credited, and a decree of distribution made and satisfied, and the sureties on the administration bond exonerated from all responsibility, and no such change of administration, the mortgage debt must be deemed satisfied and discharged, as against all persons claiming upon the mortgage, under such administrator.

It has been confidently urged in the argument, that the case of *Kinney v. Ensign*, 18 Pick. 232, is a strong, if not a decisive authority for the original demandant, to show, that if a mortgage debtor becomes the administrator of the mortgagee, it is not an extinguishment or payment of the debt, so as to discharge the mortgage. But we think that case is quite distinguishable in principle from the present. It was in equity, on a

bill by the administrator of the mortgagee, to redeem from one who had purchased the mortgagor's title to the estate, at a sheriff's sale, subject in terms to that very mortgage. That case was decided distinctly on the ground, that although it might be the right of the creditors and heirs of the mortgagee to require the administrator to account for his own debt, secured by mortgage, as assets, and to credit it in his administration account, yet they were not bound to do it; it was a right they might waive, and that, in point of fact, it had not been so accounted for. To have had the mortgage discharged in that case, would be contrary to equity, because the effect would be, to charge the sureties of the administrator, and to exonerate the estate of the defendant from an incumbrance for the security of this very debt; subject to which incumbrance, he had purchased it, at an official sale. That case, we think, does not stand in the way of the present decision.

We do not question the authority of an administrator, duly qualified, to assign and transfer a bond and mortgage; and we cannot perceive that it would make any difference, that it happened to be his own debt. And in the present case, if Farley, instead of crediting the estate of his intestate with this amount, as his own debt, had in terms credited the estate with the proceeds of the assigned bond and mortgage, it would have presented a very different question. It would not only have manifested his intent not to account for the debt, pursuant to his personal obligation, as assets realized, but a public declaration of his intent to consider the debt and mortgage as still subsisting. But so far from intimating the fact, that he had assigned the bond and mortgage, the bond alone is referred to, in the inventory, as a personal debt due from himself to his intestate, without an intimation that it was secured by mortgage. If it be said that this intention to treat the mortgage as still subsisting was manifested by the fact of his making an assignment of it to Mrs. Cogswell, the answer is, that though this might be evidence of his intent, it was a private act, not manifested even by a registration of the assignment, until nearly 20 years after, and contrary to his official and declared intent, as manifested by his

accounts filed in the probate office, to which all persons may have access. Had any one, inquiring into the title to this estate, found the mortgage of 1801 on record, he would naturally look for the settlement of the mortgagee's estate in the probate office, and would there find that the debt had been accounted for by the mortgagor, as personal property, and the estate accordingly settled, by the common and apparent proof of the payment of the mortgage.

It was argued, that as the original mortgagor and administrator had still a disposing power over the estate, in 1820, the assignment then made might be deemed a new and original mortgage, binding upon the estate. Whatever other answer might be made to this argument, we think it is a decisive one, that this assignment was not recorded until 1837, long after the rights of other parties had intervened, and that to give to it the force and effect of an original mortgage would be contrary to the laws requiring registration of deeds and mortgages.

The verdict is therefore to be amended, so as to be in favor of the tenants in the original action, upon the mortgage assigned to Mrs. Cogswell.

The question arising on the other mortgage, under which the original demandant and her executor claimed a conditional judgment, having been decided against the executor, in another action, no further notice of those questions is required.

STEPHEN S. STONE *vs.* PIERCE L. WIGGIN.

Under *Sts.* 1808, c. 65, § 6, and 1817, c. 183, an execution against a manufacturing corporation cannot be levied on the property of its members, unless there has first been a demand on the president, treasurer or clerk of the corporation, by the officer who holds the execution, to show to him property sufficient to satisfy and pay the sum due thereon; although, on the original writ, property of the members was attached, after a default of the corporation to show to the officer, who held the writ, property sufficient to satisfy the judgment which might be recovered thereon.

WRIT of entry to recover a parcel of land in Salem. The demandant counted on his own seizin, and a disseizin by the tenant.

At the trial before the chief justice, the demandant gave in

evidence a judgment recovered by him against the Salem and Boston Stage Company, incorporated by *St.* 1828, c. 136, and a levy of the execution, which issued on that judgment, upon the demanded premises, as the property of James Perkins, who was a member of that company. In the said act of incorporation, it was enacted that said company should "have all the powers and privileges, and be subject to all the duties, restrictions and liabilities prescribed and contained in 'an act defining the general powers and duties of manufacturing corporations,'" (*St.* 1808, c. 65,) "and the several acts in addition thereto;" viz. *Sts.* 1817, c. 183, and 1821, c. 38.

It appeared that the demandant's original writ against said company, in the action on which the aforesaid judgment was recovered, was served by an attachment of all said James Perkins's real estate situated in Salem, after the officer had demanded of the clerk and treasurer of the company to show to him sufficient real or personal estate to satisfy the judgment that might be recovered on said writ, and after the company had neglected, for fourteen days and more, to comply with that demand; but that said execution was levied on the demanded premises, without any previous demand upon the president, treasurer or clerk of the company, to show to the officer sufficient property to satisfy and pay the sum due thereon. Whereupon a nonsuit was entered, subject to the opinion of the whole court.

This case was argued at Boston, January 30th, 1842.

Huntington, for the demandant.

Proctor & Ward, for the tenant.

SHAW, C. J. This was the case of a judgment recovered against the Salem & Boston Stage Company, and a levy of the execution on the property of James Perkins, as a member of that corporation, liable in his individual capacity for its payment. By the act incorporating this company, they were made subject to the provisions of *St.* 1808, c. 65, defining the powers and duties of manufacturing corporations, and the several acts in addition thereto.

This liability of an individual to satisfy an execution on a

judgment to which he was not a party, and to which he had no opportunity to answer, is created and regulated by statute, and is not to be extended, by construction, beyond the plain enactments of the statute, as found by express provision or necessary implication. *Andrews v. Callender*, 13 Pick. 484.

In England, it has been held, as a reasonable restriction upon such a liability, that an individual cannot be charged in execution, as a member of such company, until there has been a suggestion, on the roll, of the facts supposed to render him liable, and he has had notice and an opportunity to come in and plead. *Bartlett v. Pentland*, 1 Barn. & Adolph. 704. But it has been decided differently in Massachusetts; and under the statutes which render individual members of manufacturing corporations liable for the debts of the corporation, it is held that no *scire facias*, or other process or summons, can issue against the individual; but he is charged, at the peril of the creditor, on the same process, which issues against the corporation. *Leland v. Marsh*, 16 Mass. 389. *Marcy v. Clark*, 17 Mass. 330.

The question is, whether, if there has been an attachment of the property of an individual member of a manufacturing corporation, on mesne process, an execution can be levied on the attached property, or any other property of the same individual, without first making a demand on the corporation for payment of the execution, or property on which to satisfy it. This must depend upon the provisions of the statutes creating and regulating this liability.

The first statute provision on this subject is that of 1808, c. 65, § 6. It provides distinctly for an attachment of property on mesne process, or the arrest of the body of any member of such corporation, if, within fourteen days after demand, the corporation doth not show the officer sufficient real or personal property, to satisfy such judgment as may be rendered against such corporation. It also provides for levying the execution, which issues on a judgment against such corporation, upon such member, if the corporation, within fourteen days after demand, shall not show sufficient real or personal property to satisfy and pay the creditor the sum due. These two distinct provisions

are thrown together in one sentence, for the sake of brevity ; but construing it according to the maxim *reddendo singula singulis*, the above is the true result of the provision of this statute.

The *St.* of 1817, c. 183, though it made some alteration in the law, did not change this essential feature. It had been decided in *Leland v. Marsh*, *ubi sup.* that the execution to be levied on the individual member, must be the same execution, on which demand had been made upon the corporation, and as it might often happen that fourteen days did not remain, before the return day of the execution, the remedy against the individual must fail, until an *alias* should issue, and a new demand be made on such *alias*. This statute therefore provided, that when demand had been made on the first execution, and it was not satisfied by the corporation before the return day, the creditor might, on taking out an *alias*, levy the same on an individual member, without a new demand. It also provided this remedy, if the corporation should not show sufficient *personal* property, and extended the liability to those persons, who were members when the debt accrued. These were all the alterations made by this statute of 1817.

It seems to us, that these two provisions, the one to attach property on mesne process, the other to seize on execution, were made *alio intuitu* ; the former, creating a lien on property, to secure a future judgment, if one should be recovered against the corporation, and not be satisfied by them ; not affecting the owner's title, not disturbing his possession and occupation of real estate ; the latter, divesting the owner's property, and applying it to the satisfaction of the corporation's debt. And we are of opinion that the latter liability, being not the party's own debt, but founded on the statute, is, by the statute, provisional and contingent, and can only exist where a demand has first been made on the corporation to satisfy and pay the sum due, and the corporation has neglected, for fourteen days, to comply with such demand. It may be likened to the contingent obligation of bail, who are liable only when their principal avoids ; and such avoidance must be shown by a return of *non est inventus*.

Nor does it make any difference in regard to this liability to

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pay and satisfy an execution, that property of the individual member had been attached on mesne process, to secure a future judgment, if not paid by the corporation. It may well happen that a corporation is able to satisfy a judgment, when it is recovered, though they were not able, or not disposed, to show personal property to be attached previously to judgment. But the decisive reason is found in the statute, which provides only that the property of a member may be taken on execution, after the corporation, which is the principal debtor, has failed, for fourteen days after demand of satisfaction on that execution, or on execution on the same judgment, to satisfy and pay the same. There having been no such demand in the present case, we are of opinion, that the levy was void, and nothing passed by it to the demandant.

Nonsuit confirmed.

CALEB M. AMES vs. HENRY CHEW & Trustee.

Money deposited in a bank by a married woman who, with her husband's consent, lives separate from him, and is not supported by him, is his money, although it is deposited in her name, and he makes no attempt to obtain possession of it. His creditors may attach it by the trustee process, and they will hold it, although the wife obtain a decree of divorce from bed and board for a cause that existed before such process was served.

THE question whether the Savings Institution in Salem was chargeable as trustee of the principal defendant, was submitted to the court on the following facts : In July 1832, Venus Chew, wife of said defendant, deposited \$ 50 in said institution, and took therefor a deposit book in her own name. She afterwards made three deposits, of \$10 each, the last of which was on the 20th of October 1836 ; and she also, in her own name, drew small sums from said institution, from time to time, till August 1841.

The defendant and said Venus intermarried in 1802, and lived together until 1820, when they separated. They remained separate until 1837 or 1838, when they came together again. On the 14th of December 1841, said Venus obtained a divorce

from the bed and board of said Henry, for cruel treatment received from him on the 13th of September 1841. On the 17th of said September, said Henry, by an advertisement in the Salem Gazette, forbade all persons to harbor or trust said Venus on his account.

While the said Henry and Venus lived apart, neither of them did any thing for the support of the other ; and said Henry never made any deposit in said institution, nor drew any money therefrom. He never attempted to exercise any control over said deposits, made by said Venus, until after the service of the writ in this action, which was on the 16th of September 1841. He afterwards drew an order, dated October 1st 1841, which was left at the office of said Savings Institution, directing the amount of said deposits to be paid to the plaintiff.

Ward, for the plaintiff.

Roberts, for the trustee.

DEWEY, J. The rights of the husband over the acquisitions of the wife are not affected by a temporary separation of the parties, voluntary on the part of both, and adopted for their comfort, convenience or interest, as the case may be ; and while thus situated, the legal disabilities and legal privileges, incident to the relation of husband and wife, continue unaltered. In case of the husband's abjuration, or exile from the country, the law does indeed give to the wife the protection and power incident to a feme sole. It does this from the necessity of the case. Her legal protector being civilly dead, she resumes her individual legal capacity to enter into contracts, to make acquisitions of property, and to sue and be sued. *Gregory v. Paul*, 15 Mass. 31. Rev. Sts. c. 77, § 4.

The same principle is also extended to the case of a married woman who, driven by cruelty and neglect of the husband, to abandon his house, and to provide for herself, should come into this Commonwealth, leaving her husband in another State, and here maintain herself as a single woman, the husband having utterly abandoned her. *Abbot v. Bayley*, 6 Pick. 89.

Our Rev. Sts. c. 77, § 18, have gone further, and provided that when any married woman shall come from any other State

or country into this State, without her husband, he having never lived with her in this State, she may contract, and may sue and be sued as a feme sole.

This case, as disclosed in the answer of the trustee, shows that a sum of money was deposited in the savings bank by the wife of the principal defendant, in her name, she and her husband living separate at the time, but both residing within the Commonwealth, and for aught that appears, in the same neighborhood. *Primâ facie*, such a deposit would enure to the benefit of the husband and might well be attached by the trustee process, by his creditor. To avoid such a result, the trustee must show, that as to this deposit the wife was to be considered a feme sole, and that the marital rights of the husband were not in force. And it is attempted to maintain this position by the facts, that the parties did not live together, that they had been separated for many years previous; that while thus living apart, neither of them had contributed any thing toward the support of the other; and that the husband had not exercised any control over her deposits in the savings bank.

Cases have occurred, as has been already suggested, of separation under such circumstances of desertion, and indicating so manifestly a renouncement of all marital duties and liabilities, that the law has invested the wife with legal capacity to act in her own name, and to acquire and hold property in her own right. But they have been cases where the husband was without the Commonwealth; cases where the court could not, by its process, compel the husband to pay the expenses, incident to her necessary support, to those who might furnish it, nor enforce the payment of any alimony that might be allowed upon her application for a divorce.

The law does not allow, and public policy strongly forbids, that by a mere voluntary separation of the parties, both continuing to reside here, they should be reinstated in their separate legal interests and legal capacities, by means of such separation. Indeed if the husband had by his extreme cruelty driven her from his house, and left her without any means of support, yet if both parties continued to reside here, she would still remain under the

legal disabilities of a feme covert, according to the doctrine stated in the case of *Abbot v. Bayley*, before cited.

With the great facilities, now existing under our statutes, for procuring a legal separation, either by a divorce *a vinculo*, or a *mensâ et thoro*, extending to every case which can possibly justify or require such separation, there seems to be no good reason for any further extension of the doctrine of the power of acquisition, by the wife, of the legal capacity and legal rights of a feme sole, by reason of her husband's acts, and independent of that formal divorce which the law in its wisdom has provided as the proper mode of separating husband and wife. It seems to us, therefore, that the money in the hands of the trustee is to be considered in the same legal view as if those parties had been living together as husband and wife, at the time of making the deposit, and the husband had assented to such deposit by the wife in her own name. Such investment in the name of his wife, by the husband directly, or by his permission, if of property legally his by acquisition, and holden really in his own right, could not be legally made for the benefit of the wife. Such investment in her name, by his consent, might bar the heirs of the husband, and might confer upon her all the legal rights of survivorship, as regards the claims of such heirs; but it would be invalid as against the creditors of the husband. Although deposited in the name of the wife, it is the husband's money, and may be demanded by him, or taken by his creditors.

But if we were to give greater effect to this deposit, and consider it as the wife's chose in action, and allow her the full benefit of the doctrine of right by survivorship, there would still be difficulties in the way, if we attempt to sustain her right to the money now in controversy upon that ground; as no case exists for the application of the doctrine of survivorship. Before the dissolution of the marriage by death or divorce, the wife's choses in action, if unnegotiable, as the present credit in the hands of the trustee is, may be attached by the creditors of the husband, by the trustee process, and they may thus compel its reduction to possession for their benefit. *Holbrook v. Waters*, 19 Pick' 354. *Wheeler v. Bowen*, 20 Pick. 563.

The husband is yet living, and there has been no divorce from the bond of matrimony. It is true that there has been, since the attachment, a divorce from bed and board, but not accompanied with a decree vesting in the wife her choses in action, or other personal property. This would present an insuperable difficulty to the supporting of the wife's claim to this money, treating the deposit as a chose in action of the wife.

It seems to us, therefore, that the money deposited in the savings bank, whether considered as the money absolutely of the husband, as we hold it to be, or considered as a chose in action of the wife, was liable to the trustee process, at the suit of the creditors of the husband, and that no subsequent proceedings, which have taken place, have defeated the attachment of it in the hands of the trustee.

EZEKIEL ALLEN & wife vs. MARY HOYT & others.

A., being owner of land, as tenant in common with B., in equal moieties, devised his moiety, in fractional parts, to four devisees: B. afterwards died intestate, and his moiety descended to his five heirs at law, four of whom were said devisees of A.: The moiety of the land that descended to B.'s heirs was divided, by process from the probate court, from the other moiety, and set off to them: One of A.'s devisees afterwards filed a petition for partition of the moiety devised, praying that his portion thereof might be set off to him in severalty. *Held*, that the petitioner was entitled to partition as prayed for, and was not bound to include in his petition the moiety which descended to the heirs of B.

A., owning an undivided moiety of lands and a dwellinghouse, devised to B. C. and D. each one fifth part of *all his real estate*, and to E. two fifth parts thereof, and to D. and E. each one fourth part of his dwellinghouse; without adding words of limitation or inheritance. *Held*, that D. and E. took the testator's moiety of the dwellinghouse, as a specific devise, and that B. C. D. and E. took the residue of his real estate in fee.

Where a testator devised one fifth part of all his real estate to S., the wife of A., and her children, A. having children at the time the devise was made, it was held that S. and her children took one fifth of the estate as tenants in common.

THIS was a petition for partition, in which the petitioners prayed that one undivided fifth part of certain parcels of land, and a dwellinghouse and its appurtenances, might be set off to them in severalty.

The petitioners claimed title as devisees under the last will

of Thomas Roberts, late of Hamilton, who, at the time of the execution of his will, and at the time of his decease, was the owner in fee of one undivided half of the real estate described in the petition, as tenant in common with his brother, Francis Roberts; and the petition alleged that the respondents were seized, in common with the petitioners, of the premises described in the petition, as devisees, either in fee or for life, under the same will.

The respondents pleaded the general issue, viz. that the petitioners did not hold in manner and form, &c.

Thomas Roberts died in October 1833, and his will was duly proved and allowed. Francis Roberts died intestate, in December 1833.

The clauses in the said will of Thomas Roberts, on which the questions in this case arose, were these: "I give to Sally, wife of Ezekiel Allen, and her children, one fifth part of all my real estate in common with my brother Francis Roberts, and one fourth part of my household furniture; also one fourth part of my pew, in the meetinghouse, in common: I give to widow Mary Hoyt one fifth part of all my real estate, and one fourth part of my household furniture, and one fourth part of the pew: I give to Abigail Roberts one fifth part of all my real estate, and one fourth part of my household furniture; also one fourth part of the pew, and one fourth part of the dwellinghouse in common with my brother: I give to Elizabeth Roberts two fifths of all my real estate, in consequence of her blindness; also one fourth part of the dwellinghouse lying in common, as abovementioned; also one fourth part of my household furniture, and one fourth part of the pew, as abovenamed."

The heirs at law of Francis Roberts were the three respondents, viz. Mary Hoyt, Abigail Edwards, wife of Benjamin Edwards, and Elizabeth Roberts, together with Sally Allen, (one of the petitioners,) and the five children of a deceased niece of said Francis.

At the time of the decease of said Thomas Roberts, the petitioners had four children, all under the age of 21 years, two only of whom had come of age at the hearing of this case.

After the decease of said Francis Roberts, the real estate, which was owned in common by him and his brother, was divided by legal partition in the probate court, and the portion that was assigned to the heirs of said Francis, was set off to his abovenamed heirs at law. His widow, to whom one third of his estate was set off as dower, died after the present petition was filed, and the reversion in that part of said Francis's estate had not been divided among said heirs.

The respondents claimed the right to have included in the petition all the real estate which was owned in common by said Thomas and Francis, and contended that the petitioners were not entitled to partition of the one undivided half which was devised to them by said Thomas, without including the estate which descended to them from said Francis.

It was agreed by the parties, that if the court should be of opinion, on the foregoing statement, that all the estate which was owned by said Francis Roberts ought to be included in the petition, or if the children of the petitioners ought to have been made parties, then the petition should be amended accordingly, and judgment for partition be entered ; otherwise, that the petitioners should have judgment for partition on the petition in its present form.

Roberts, for the respondents.

N. J. Lord, for the petitioners.

HUBBARD, J. One objection made by the respondents to the prayer of the petition is, that all the real estate, which belonged in common to Thomas and Francis Roberts, is not embraced in the petition, and that they are not entitled to partition of the undivided half of the estate devised by Thomas, without including the estate left by Francis Roberts. It appears by the facts agreed in the case, that after the decease of Thomas who died testate, and Francis who died intestate, the estate which the two brothers held in common was divided in the probate court, and that the portion assigned to the heirs of said Francis was duly set off among them. The regularity of the proceedings in the probate court is not brought in question before us by either party, and no appeal having been taken from the decree

of distribution made by that court, we are not at liberty to disturb it, or treat it as a nullity, as the respondents contend for. Besides ; we see no reason, for the cause assigned, to set it aside, even if the decree of partition had been appealed from ; because the devisees of Thomas and the heirs of Francis are not in every instance the same persons ; and where they are the same, they are interested in different proportions in the respective estates of said Thomas and Francis.

In respect to the half of the dwellinghouse and the appurtenances, belonging to the said Thomas Roberts, of which partition is prayed by the petitioners, it appears, by the will, that he made his four nieces, Sally Allen, (including her children,) Mary Hoyt, Abigail Roberts and Elizabeth Roberts, the especial objects of his bounty ; but instead of devising his real estate among them, into four parts, he divided it into fifths, and gave to his niece Elizabeth, in consequence of her blindness, two fifth parts of his real estate, and to Sally, Mary and Abigail one fifth part each. But as to his household furniture and pew, he gives each a fourth part, and in addition to his devise to Abigail Roberts of one fifth part of his real estate, he gave one fourth of the dwellinghouse, owned in common with his brother ; and also to Elizabeth Roberts one fourth part of the dwellinghouse lying in common, as abovenamed. The petitioners, Ezekiel Allen and wife, claim an undivided fifth part of the dwellinghouse, as a portion of the real estate of said Thomas Roberts. But to entitle them to such partition, we must either treat the devise of the dwellinghouse to the two other sisters as merged in the devise of the real estate, or we must consider that he meant to give a fourth part of one half of the dwellinghouse, or one eighth part each, to Elizabeth Roberts and Abigail Roberts, and three eighth parts to Sally, Mary and Abigail. But we think this is not the construction of the clauses of the will ; but that the half of the dwellinghouse was a specific devise to the two sisters, and that it was the residue of his real estate which he devised to the five sisters.

The last question is, what estate Sally Allen, the petitioner, took under the will. The will is inartificially drawn, and it is

not easy to ascertain the precise intention of the testator. The counsel for the petitioners contends, that it was the intention to give the estate in fee to Mrs. Allen and her heirs, and that such would be the popular understanding of the will ; while it is argued on the side of the respondents, that she took either an estate in common with her children, or an estate for life, and her children the remainder.

As we have no means, but from the language of the will, to arrive at the intention of the testator, we must give the words their legal meaning, as expressive of his intention.

We are of opinion, that in the devise, "I give to Sally, wife of Ezekiel Allen, and her children, one fifth part of all my real estate," the words, "and her children," are words of purchase, and not of limitation. If there had been no children born at the time of the devise, these words would be construed as words of limitation, if necessary to give effect to the intention of the testator ; and the devisee would then have taken an estate tail, because the intent of the devisor was certain, that the children should take, and there were none in being to take by way of remainder. But in the present case, the children were living at the time of the devise, and capable of taking ; and the intention being expressed that they should share with the mother, they will take with her as tenants in common of one fifth part of the devised estate : And with this agrees the rule in *Wild's case*, 6 Co. 16 b. In the present case, the fee passes, as the residuary estate devised, and it was the testator's intention to dispose of the whole estate. See *Buffar v. Bradford*, 2 Atk. 220. See also *Annable v. Patch*, 3 Pick. 360, where it is held that by a devise of "all the remainder of my estate, both real and personal, to my daughter S. A. and the children of her body," S. A. and her children take as tenants in common.

Agreeably to this opinion, therefore, the petition may be amended, and the children made parties, by their guardian, and the shares of the petitioners may be set off together, or in severalty, at their election. Rev. Sts. c. 103, § 21. And we see no objection to a farther amendment of the petition, so as to include the part which was set off to the widow, who has deceased, and which is said not to have been divided.

COMMONWEALTH vs. SAMUEL DOW & another.

A defendant, on being convicted of an offence, in the court of common pleas, at the March term thereof, alleged exceptions to the opinion of the court, and entered into a recognizance to enter and prosecute the same, not at the supreme judicial court "next to be held for the same county," as the law requires, and which was in April, but at the next November term of that court: The defendant not having entered his exceptions, either at the April or November term, the Attorney General filed a complaint, setting forth the facts, and prayed the court to order a *capias* to be issued and the defendant to be brought into court. *The court held* that they had jurisdiction of the cause, and ordered a *capias* to issue against the defendant. On his being brought in, his counsel declined to argue the exceptions, and the court awarded sentence against him on his conviction.

THE defendants were convicted, at the last March term of the court of common pleas, of the offence of resisting a deputy sheriff in the execution of the duties of his office; and they alleged exceptions to the order of the court overruling a motion filed by them in arrest of judgment. They thereupon entered into a recognizance for their appearance at the present term of this court, and to enter and prosecute their exceptions with effect, &c. There was an intermediate term of this court in April last; but the defendants did not appear and enter their exceptions, either at that term or at the present.

The Attorney General now consented that the defendants might enter the exceptions as of April term, and bring them forward for argument. The defendants' counsel declined so to do, and contended that there was a discontinuance of the whole case, because the Rev. Sts. c. 138, § 13, require that parties, who file exceptions in the court below, shall recognize to the Commonwealth for their appearance "at the supreme judicial court *next to be held* for the same county, and to enter and prosecute," &c.; that the recognizance of the defendants was void, because the court below had no authority to order or to take it; and that this court could in no way take cognizance of the cause.

The question, what should be done in the premises, was referred to the court.

Austin, (Attorney General,) for the Commonwealth.

Lunt, for the defendants.

SHAW, C. J. It was no doubt through mistake and inadvertence, that when the exceptions of the defendants were allowed in the court of common pleas, the recognizance to enter and prosecute was taken to this, the law term of the court for this county, and not to the then *next term* of this court, to be held in this county, in April last. But it is a very different question, whether the failure of the defendants in doing their duty, which was to enter the cause in this court at the proper term, is to discharge them from all liability on a valid indictment, on which they have been convicted by the verdict of a jury, before a court of competent jurisdiction. It is a question of great practical importance in the administration of criminal law. The jurisdiction of the several courts, and the course of proceeding, being frequently modified by statute, it becomes necessary to look back and examine the statutes from time to time, to see that we fall into no mistake. Above all, it is necessary to understand precisely the relative powers and duties of this court, and those of the court of common pleas, who have, practically, nearly the entire administration of the criminal law.

The general object of the system of this branch of jurisprudence in the Commonwealth is, that all criminal proceedings shall commence in the common pleas; that *that* court shall have the exclusive jurisdiction of all trials of fact, in cases not capital, without appeal, and that *this* court shall have a general superintendence, and a revision of all matters of law. For, although by Rev. Sts. c. 138, appeals were allowed in a considerable number of cases, yet they were taken away by St. 1839, c. 161, leaving to this court a power of revising, in all matters of law, as before.

The right of any person, aggrieved by any opinion, direction or judgment of the court of common pleas, in matter of law in a criminal case, to file exceptions, is given by Rev. Sts. c. 82, § 29, and c. 138, §§ 11, 13, and 14. By the former it is provided, that any person, so aggrieved in matter of law, may allege exceptions thereto, in the manner provided by Rev. Sts. c. 138, and the case shall thereupon be removed to the supreme judicial court, and be there disposed of, as provided in the same chan-

ter. By the other, (c. 138, § 11,) it is provided, that after such exceptions are allowed and signed by the presiding justice of the common pleas, all further proceedings in the case, in that court, shall be stayed, unless, &c. Sect. 12 provides that questions of law may be voluntarily reserved by the judge. Sect. 13 enacts, that any person, who shall file exceptions, may recognize to the Commonwealth for his personal appearance at the supreme judicial court next to be held for the same county, and to enter and prosecute his exceptions with effect, and to abide the sentence thereon. Sect. 14 provides that if the person shall not so recognize, he shall be committed to prison to await the decision; that the clerk shall file a copy of the proceedings in the case, in the supreme judicial court, who shall have cognizance thereof, and consider and decide the cause, and render such judgment and award such sentence, or make such order thereon, as law and justice shall require; and a new trial may be ordered at the bar of the supreme judicial court, or the cause may be remanded to the common pleas for a new trial there, as the justices of the supreme judicial court shall direct.

We have stated these provisions at some length, for the better understanding of the subject. Taking them together, it is very clear that the proceeding is designed for the benefit of the accused, and to enable him to have the benefit of the judgment of this court, when he may think the law is wrongly decided against him. It is further obvious, that when exceptions are allowed, no sentence or judgment is ordinarily passed; because all further proceedings are to be stayed, unless it shall clearly appear to the presiding justice that they are frivolous, immaterial or intended for delay; in which case, judgment may be entered and sentence awarded, notwithstanding the allowance of such exceptions. This is a clear implication, that in all other cases, when the exceptions are allowed, no judgment is to be entered, nor sentence awarded. From this view of the case, from the express provisions in the statute, that all further proceedings in the cause in the court of common pleas shall be stayed, and that full power is given to the supreme judicial court to render any judgment and pass any sentence, which the law may require, it

is manifest that the court of common pleas have no further jurisdiction, whether any thing is done in this court or not, and can render no judgment. They can acquire no jurisdiction, except under an order passed by this court, remanding the cause to them for a new trial. On such an order, the case would be entered anew in the common pleas. *Commonwealth v. Peck*, 1 Met. 435.

We have then the case of a valid indictment for an aggravated offence, a regular conviction before a competent court, but no judgment rendered, and the cause lawfully removed, so that that court can render none. What shall be done in such case? Does it depend upon the will of the exceptant to bring forward and enter the case, and thus enable the Commonwealth to have judgment against him, or not, at his pleasure? Surely such could not have been the intent of the law. In that case, he might only forfeit his recognizance, or give a void one, as in the present case, to avoid punishment altogether. If he gives a recognizance, it is to be conditioned to enter the exceptions at the next term of the court. But he need give no recognizance. It is not the recognizance, which gives or limits the jurisdiction of this court, but it is the statute. The provision is, that upon allowing the exceptions, "the case shall thereupon be removed to the supreme judicial court, and be there disposed of." Rev. Sts. c. 82, § 29. So in c. 138, § 14, the supreme judicial court shall have cognizance thereof, and decide the cause, render judgment, and award sentence. This authority is general, and limited to no term of the court. As the removal of the proceedings takes place for the benefit of the exceptant, the law, in order to facilitate the proceedings, very properly requires him, (if he be not committed,) to give security to bring forward the record and enter the case, and if he does so, to do it at the next term. This is the only case, in which the next term is mentioned; it is a collateral obligation, incident to the jurisdiction of the court, but not essential to it.

The question then recurs; if the exceptant does not enter the case, and bring forward the exceptions, how is judgment to be rendered? It is not much contended, that if the recognizance

had been rightly taken for the next term of the court, and the exceptant had not seasonably entered the case, the public prosecutor might not enter it, and pray for judgment. But upon what ground could this be done? There is no provision in the statute, authorizing the public prosecutor to enter it, if the exceptant does not; but it results from the consideration that this court has full cognizance of the cause, which no other court has; and because it is the right and duty of the public prosecutor, acting for the Commonwealth, to ask for judgment on such a conviction. But such cognizance of the cause is not limited to the next term of the supreme judicial court, either in terms, or by implication, or by any considerations arising out of the nature of the case. On the contrary, such a limitation of the power of the court to the first term would encourage trick and artifice, and tend to the perversion of justice. Laches is not imputable to the government, nor, in general, can its rights be lost by delay. The court are therefore of opinion, that it is competent for the public prosecutor, acting in behalf of the Commonwealth, at any reasonable time to bring forward the record, and on motion have the case entered; and that this court has, thereupon, authority to render judgment and pass sentence, or take any other order in the case. A convenient mode of doing this, we think, would be for the Attorney General, or other public prosecutor, to call the attention of the court to such a case, by a short complaint, or motion in writing.

If the question be, how, after having jurisdiction of the cause, we are to obtain jurisdiction of the persons, we think the answer is plain. By the Rev. Sts. c. 81, § 3, the justices of the supreme judicial court "shall have cognizance of all capital crimes, and of all other crimes, offences and misdemeanors, which shall be legally brought before them." By § 9, of the same chapter, they have power to issue all such writs and processes, as may be necessary and proper to carry into full effect all the powers, which are or may be given to them by the laws of the Commonwealth. Under this authority, when the record is before the court, and the party convict liable to judgment, it is competent for the court to issue a summons or warrant to bring in the

party. In the present case, a warrant is the proper process, returnable, forthwith, to this court.

After the above opinion was delivered, the Attorney General filed a complaint, setting forth the previous proceedings and the failure of the defendants to enter and prosecute their exceptions, and praying that a *capias* might issue against them. A *capias* was thereupon issued, and the defendants were brought into court. Their counsel declined to argue the exceptions; and there being no further motion in arrest of judgment, the defendants were severally sentenced.

JOSEPH S. CHRISTIAN vs. THE COMMONWEALTH.

Where a writ of error is brought upon a judgment in a criminal case, under St. 1842, c. 54, the prosecuting officer of the Commonwealth is not bound to take notice and act thereon, until fourteen days after a *scire facias* to hear errors has been served upon him.

THIS was a writ of error to reverse a judgment of the municipal court of the city of Boston, by which the plaintiff in error was sentenced to solitary imprisonment, and confinement at hard labor in the state prison.

The *scire facias* to hear errors, in this case, was served upon the Attorney General, three or four days only before the commencement of the present term, and he therefore moved that the writ might be dismissed, or the case be continued, and a new service made.

By St. 1842, c. 54, writs of error, upon judgments in criminal cases, "may be brought at any time after such judgments are rendered, and may be entered in any county, as well as in that where the judgment was rendered, and shall be entitled to the same privilege, as to the hearing thereof, as is given to writs of habeas corpus by the one hundred and eleventh chapter of the revised statutes." But no provision is therein made respecting service.

BY THE COURT. As no specific provision is made for this case, by any statute, and as a *scire facias* to hear errors is an original writ, it comes within the general provision of the Rev. Sts. c. 90, § 21, by which original writs, issuing from this court, or the court of common pleas, are to be served fourteen days at least before they are returnable. The Attorney General, acting

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in behalf of the Commonwealth, may accept shorter notice, if he so please ; but he is entitled to the full fourteen days to examine into the case, before he can be required to attend to it in court.

G. Bemis, for the plaintiff in error.

Austin, (Attorney General,) for the Commonwealth.

JACOB DASCOMB & another, Executors vs. LEVI DAVIS

A testator, after ordering all his debts to be paid, and giving certain legacies, devised one third part of all his estate, real and personal, of which he should 'die seized,' to C., to hold the same to her and her assigns forever ; 'the same to be paid to her' by his executors, as soon after his decease, as should, in their judgment, be most for the advantage of all concerned in his estate : 'The remainder of his estate, real and personal, of which he should 'die seized,' he devised to his minor children in equal proportions, to hold to them and their assigns forever, after payment, by his executors, of all his debts and legacies, 'to be paid' by his executors, to said children, severally, as they should come of age, or so much thereof as should remain of principal and interest, after furnishing to them the means of support and education, till they should be qualified, on account of age, 'to receive said legacies' : The testator then ordered, that his executors should manage his estate and effects, and dispose of all his lands, chattels, &c. for the purposes above mentioned, at such time and in such manner, as should be most likely, in their judgment, to do justice to all his creditors, and be for the greatest advantage of all concerned in his estate ; and he also directed his executors, in order to increase the proceeds of his estate, to sell the wood, growing on his land, separate from and previous to the sale of the land on which it was growing, except so much of the young wood as should, in their judgment, add to the amount of his estate, by being sold with the land.

Held, that by the legal effect of the several provisions of the will, the executors had such a title and interest in the land of which the testator died seized, as authorized them to maintain an action of trespass *quare clausum fregit* for an illegal entry upon such land.

Where a testator devised land of which he obtained the right of possession by a judgment on a petition filed by him for partition, pursuant to *Sts.* 1783, c. 41, and 1786, c. 51, and after notice given, to all persons interested, of the pendency of such petition, it was held that he died seized of the land, although others, who claimed title thereto, occasionally entered upon it and cut wood thereon, after the judgment of partition.

Under *St.* 1839, c. 107, § 2, an executor, who is plaintiff in a suit in which he has no interest, except such as arises from his liability for costs and expenses of the suit, may be a witness in such suit, if there be first tendered to him such security for his liability for costs, as is sufficient, in the opinion of the court, to indemnify him on account thereof ; and he need not also release his right to recover costs of the defendant in such suit, in order to enable him to testify.

TRESPASS for breaking and entering the plaintiffs' close in Andover, on the 24th of November 1840, and on divers other

Dascomb & another, Executors v. Davis.

days, and cutting down and carrying away trees there growing. The plaintiffs sued as executors of the last will of George French, which was executed in July, and was proved and allowed in October, 1837.

At the trial in the court of common pleas, before *Strong, J.* the plaintiffs offered to show that their testator died seized of the *locus in quo*, and that, by his will, they were entitled to maintain this action. For this purpose, the will was introduced. By the will, the testator, after directing the payment of all his just debts, bequeathed to his executors, the plaintiffs, \$1000 in trust, the income whereof they were to pay to his mother, during her life, and after her decease, to pay two thirds of said sum to his children, and one third thereof to *Clarissa J. Chapman*. The testator then devised and bequeathed to said *C. J. Chapman* one third part of all his estate, real and personal, of which he might "die seized," and which should remain after payment of his debts and of the \$1000 aforesaid, "the same to be paid her by said executors," as soon after his decease, as should "in their judgment be most for the advantage of all concerned in the estate." The remainder of his estate, real and personal, of which he might "die seized," the testator devised and bequeathed to his children, in equal proportions, to be paid to them by his executors, when they should severally arrive at the age of 21 years, or so much thereof as should remain "of principal and interest, after furnishing them the means of their support and education, till they are qualified, on account of age, to receive the legacies herein named."

The next two clauses in the will were as follows: "*Fifth.* I will and order, that my executors manage my estate and effects, and dispose of all my lands, goods, chattels, rights and credits, for the purposes herein before mentioned, at such time, and in such manner, as shall be most likely, in their judgment, to do exact justice to all my creditors, and to be for the greatest advantage of all concerned in my estate. *Sixth.* I will and order my executors, in order to increase the proceeds of my estate, to sell the wood now growing on my woodland, separate from and previous to the sale of the land on which it grows, un-

less it be so much of the young wood as shall, in their judgment, add to the amount of my estate, by being sold with the land."

The judge ruled, that if the testator died seized of the close described in the plaintiffs' writ, they were authorized by the will to maintain this action.

The plaintiffs then introduced a copy of the record of a process in partition, from which it appeared that the testator presented to the court of common pleas, at March term 1828, a petition for partition of a tract of woodland in Andover, described by metes and bounds, in which petition he alleged that he was seized in fee of one undivided half of said tract, as tenant in common with some person or persons to him unknown; that an order was passed on said petition, directing the petitioner to give notice to all persons interested, (by publishing a copy of his petition, and of said order thereon, three weeks successively, in the *Salem Gazette*, a newspaper published in this county,) that they might appear at the next June term of said court, and show cause, &c. ; that notice was given, pursuant to said order, and that, at the next June term, no person appearing to show cause, the interlocutory judgment, that partition be made, was entered, and three freeholders in said county were appointed to make partition, who made return, at the following September term of said court, that they had set off to the petitioner one half, "for quality and quantity," of the land described in his petition, viz. four acres — describing the same by metes and bounds : Whereupon it was "considered by the court, that said return be accepted and recorded, as the law directs, and that the partition aforesaid be held firm and stable forever."

It was admitted by the defendant, that the land thus set off to the testator, on the aforesaid process of partition, included the close described in the plaintiffs' writ.

The plaintiffs then gave evidence of the cutting and carrying away of wood, as alleged in the writ. The defendant objected, that this evidence was not sufficient to entitle the plaintiffs to maintain their action, as they were not in possession. The judge ruled, that the judgment of partition vested the right of

possession in the testator, and that the plaintiffs could maintain the action, if the testator died seized.

The defendant then called his son, Levi Davis, jr. as a witness, who testified that the land, described in the plaintiffs' writ, adjoined the land of his father, and formerly belonged to his grandfather; that he never knew any one, except his father, to cut wood on said land; that wood had been cut there, as long as he could remember—he being 42 years old—“some years more, and some years less;” that he never heard that French (the testator) claimed the land; that in the year 1834, he (the witness) was at work for French, on an adjoining tract of land, and French told him not to go upon this land, because it was not settled for. He further testified that his father “claimed to own the land,” and that he had, every year, cut wood on it, since the witness heard that “Mr. Kittredge gave Mr. Mears a deed of it,” and that he “never knew French to be on the land, or to do any thing upon it.”

Paschal Abbot, one of the plaintiffs, was then offered, on the part of the plaintiffs, as a witness, under St. 1839, c. 107, § 2. Sufficient security against his liability for costs was tendered to and accepted by him; viz. a bond, with sufficient surety, to indemnify him from all costs which the defendant might recover. The defendant objected that this was not sufficient to entitle him to testify; but the judge admitted him. He testified, that in the winter of 1827 or 1828, French, the testator, came to his counting room with Simeon Kittredge; that French and Kittredge made a settlement, and that French paid Kittredge money; that French took a deed out of his hat, which he (the witness) read, and found to be a deed of the land now in dispute; that the witness owned land adjoining, and went upon it, with French, in the fall 1828, and after looking at it, went with French upon the land described in the writ in the present action; that French then showed the witness this piece of land, and the witness showed French the bounds; that French said he wished the witness to look at the land he (French) had bought of Kittredge, and to judge of the equity of the partition; that the witness, four or five years afterwards, went upon the

same land with French, who supposed that some one had been cutting wood on it ; that French, at that time, spoke of it as his land, and said he intended to prosecute those who had cut the wood ; that the witness was again on the land with French, in 1836, about a year before he died, and that " he then spoke of it as his, and as a growing piece."

The judge ruled, that notwithstanding the testimony of Levi French, jr. taken in connexion with that of Paschal Abbot, George French had the right of possession, by virtue of the judgment of partition.

The defendant then put in evidence a deed from Simeon Kittredge to Joseph Mears, dated January 18th 1825 ; also a deed from Joseph Mears to William Ferguson, dated March 28th 1825. These were deeds of warranty, and were both recorded on the 31st of March 1825. The defendant also put in evidence a deed of quitclaim from William Ferguson to the defendant himself, acknowledged September 4th, and recorded November 27th, 1840. The said deed from Kittredge to Mears was furnished to the defendant by the plaintiffs, in whose possession it was found. The deed from Kittredge to Mears, and from Mears to Ferguson, purported to convey one undivided half of a tract of land which included that which is described in the plaintiffs' writ, and in each of those deeds the defendant was mentioned as the cotenant of the grantor, and as owning one undivided half of said land.

The plaintiffs contended, that the deed from Ferguson to the defendant was inoperative, because at the date thereof Ferguson was disseized by the aforesaid judgment in partition.

The judge ruled, that notwithstanding the said deeds, put in evidence by the defendant, the right of possession, so far as it respected the maintenance of this action, was in George French, the testator, at the time of his death, and that the plaintiffs, as his executors, could maintain the action. The jury were accordingly directed that they should find a verdict for the plaintiffs, which was found accordingly.

The defendant alleged exceptions to the abovementioned rulings and decisions.

Daseomb & another, Executors v. Davis.

N. J. Lord, for the defendant.

Hazen, for the plaintiffs.

DEWEY, J. Several objections are taken to the ruling of the court of common pleas in this case. 1. That admitting the testator, George French, to have been the lawful owner and to have died seized of the premises upon which the trespasses are alleged to have been committed, yet that the plaintiffs, under the will of said French, derived no such title or interest in the lands devised, as would authorize them to maintain the present action. Upon this point, the court are of opinion, that under the very broad authority, given by the will to the executors, to manage as well as dispose of all the real estate, and as the proceeds of two thirds of the same were to be retained by them until the children of the testator severally arrived at the age of twenty one, the executors acquired the right to maintain an action of trespass for any illegal entry upon the land, if the testator died seized and possessed thereof.

2. Did the judgment in partition, rendered on the petition of George French, at the court of common pleas, September term 1828, by which this land was set off to him in severalty, vest in him the possession, so that the same was transmissible by his will? We think such was the effect of the judgment in partition. This proceeding was instituted by virtue of *Sts.* 1783, c. 41, and 1786, c. 53, authorizing partition, upon petition of one of the tenants in common. The latter of these statutes provided the mode of settling any controverted facts between the parties, as to their interest in the premises. Such partition, legally made, is declared by the former of these statutes, § 1, to be valid to all intents and purposes. That it established the right of possession, as against all the cotenants, and also against one claiming to hold in severalty, was directly decided in the case of *Cook v. Allen*, 2 Mass. 470, to which case I refer for a very full and able consideration of this point. The Rev. *Sts.* c. 103, §§ 33, 38, seem to have gone further, and made such judgments in partition binding, not only on the right of possession, but the right of property also, as to all parties and privies to the judgment, including all persons who might by law have appeared and

answered to such petition ; saving only the right of one claiming to hold the premises in severalty, and who has not appeared in the petition for partition, to institute an action for the land so claimed by him. Nor do we perceive any thing in the other facts disclosed by the testimony, that defeated the right of possession acquired by virtue of the judgment in partition.

3. The remaining question, viz., whether Paschal Abbot was a competent witness in this case, is one of more difficulty and doubt. He was one of the plaintiffs in the action, and upon the ordinary common law rule applicable to the admission of testimony, he would have been an incompetent witness. If admissible at all, he is so by force of *St.* 1839, c. 107, § 2, which is in these words : “ Any executor, administrator, guardian or trustee, who may be a party to any suit at law or in equity, having no interest therein, except such as arises from his liability for costs and expenses of suit, may be a witness, in such suit, to any matter known to him before he assumed the trust of his appointment ; provided he shall first release his right to recover costs in such suit, or shall receive, or have tendered to him, such security for his liability for costs, as in the opinion of the court before which the case is pending, shall be sufficient to indemnify him on account thereof.” The precise question here is, whether enough was done to remove the disability which attached to the witness, by reason of his relation to the case, as a party. That the receipt of a bond, with surety, to indemnify the plaintiff against all cost which the defendant might recover, would not remove all pecuniary interest in the issue of the trial, must be quite obvious ; as in the event of a recovery, he would be entitled also, as plaintiff, to recover his taxable costs : Whereas if a judgment was rendered for the defendant, the plaintiff would recover no costs. His interest arises from two sources ; first, he is interested in maintaining the action, as thereby he recovers costs ; and secondly, he is interested in maintaining the action, as upon the failure so to do he is liable to pay costs to the defendant. The bond tendered and accepted, in the present case, only removed this latter interest. It was a bond to indemnify him against all costs which the defendant might recover If

therefore the result of the question of the competency of the witness depended upon the fact whether all his interest had been removed, we should have no hesitation in saying that he was incompetent. This however is not, strictly, the inquiry ; but the question is, whether the statute has not, by force of its provisions, made him a competent witness, upon his being indemnified against his liability for costs to the defendant. Giving the statute a literal construction, such is obviously its effect. It provides two modes, by which the disqualification may be removed ; he may release his right to recover costs, *or* he may have tendered to him a bond to indemnify against costs. Should *or* be read *and*, in this statute ? Clearly it is necessary to read it so, if we would give it a construction which would remove all interest from the witness. But before adopting such reading of it, it must be made very apparent that it would then be in a form of expression that would effectually secure the object of the legislature. But thus to read it, would, in another aspect, defeat the very purposes of the act. The party, who may be executor or trustee, is to be a witness at the request of either party, upon compliance with the provisions of the statute ; but if *or* be read *and*, the other party can never remove the disability of the witness ; as it is the executor himself, who only can release his right to costs ; and therefore, in such case, all the party can do, is to tender a bond of indemnity for costs. The construction proposed is not, therefore, so manifestly within the design of the legislature, as to authorize us to adopt it ; and such being the case, we are brought back to the language of the statute, which, in its terms, permits the introduction of the testimony of the executor, upon having tendered to him such security for his liability to costs, as in the opinion of the court, before which the case is pending, shall be sufficient to indemnify him on account thereof.

Adopting this rule of construction of the statute, the witness was competent, and properly admitted. The result is, therefore, that the ruling of the court of common pleas was correct.

Exceptions overruled.

THOMAS SAUNDERS vs. ELIZABETH ROBINSON.

Where the relation of landlord and tenant does not exist, a party entitled to the possession of lands or tenements cannot maintain the summary process by complaint, provided by the Rev. Sts. c. 104, in cases of forcible entry and detainer, unless there has been an actual forcible entry or detainer, by violence or threats of violence in taking or keeping possession, or some act or threat of force adapted to alarm the party, or deter him, from apprehension of forcible resistance. Such complaint is not sustained by proof of a mere unlawful entry into a house, after the owner has forbidden such entry, and a refusal to leave it, after repeated orders to leave it, without proof of the use of any violence or threats of violence, or any show of a determination forcibly to make the entry, or forcibly to resist the entry of the owner.

THIS was a complaint, originally brought before a justice of the peace, on the Rev. Sts. c. 104, for forcible entry and detainer of a dwellinghouse in Lynn. On the trial in the court of common pleas, the defendant claimed title to the premises in question. The plaintiff gave evidence that the house was mortgaged to him by Henry Breed, that the mortgage was foreclosed, and that he received possession under a writ of *habere facias*.

Andrew Breed testified, that he was the plaintiff's agent to take care of said house and collect the rents ; that in December 1840, a part of the house was vacant, and the defendant, about that time, twice asked him to let that part of the house to her, which he declined to do ; that he, on the 29th of said December, saw a teamster putting furniture into the house, and directed him to desist, and to take out what he had put in ; that he then entered the house and met the defendant in the entry ; that she then said the furniture was hers and that she " was going to occupy the house ; " that he forbade her to remain in the house, and ordered her to leave it, and to take out her furniture ; that she thereupon said she " had a right there, and she and her furniture should both stay there " ; that he then repeated his orders to her and to the teamster, and told her that if she remained there, she would remain as a trespasser ; that he afterwards went to the house, and the defendant said, if he would let her stay a little while, she would leave the house ; that he refused to

give her any permission, and ordered her to quit ; that she thereupon said she had consulted counsel, and had a right to stay in the house, and she would stay ; that he called again on the defendant, in January 1841, and understood her to say she would quit peaceably on the first of April ; that he did not then agree to let her stay, but directed her to leave immediately : That he called on the defendant on the first of April, and ordered her to quit, and that she then answered, that she had consulted counsel, and should continue to hold the house ; that he replied, she was lucky in being a woman, or he would put her out of the house ; and she rejoined, that she should like to see him do it.

The witness further stated, that he did not touch the defendant nor her furniture, and that she did not touch nor threaten him, nor order him to go out of the house.

It was not suggested by the plaintiff, that the relation of landlord and tenant existed between him and the defendant.

The judge, who tried the cause, ruled that the plaintiff, under the foregoing evidence, could not maintain his complaint ; and he instructed the jury, " that the summary process, here instituted by the plaintiff, could not be maintained in the absence of all relation of landlord and tenant between the parties, unless there was evidence of an actual forcible entry or detainer by violence, or threats of violence, in taking or keeping possession, or some act or threat of force, calculated to alarm the plaintiff or his agent, or deter him, from apprehension of forcible resistance ; and that there was no such evidence of force here, in taking or keeping possession, as would sustain the complaint."

The jury returned a verdict for the defendant, and the plaintiff alleged exceptions to the above ruling and instructions of the judge.

Roberts & Ward, for the plaintiff.

Hallett, for the defendant.

SHAW, C. J. This suit was commenced by a summary process, by way of complaint before a justice of the peace, for forcible entry and detainer, on the Rev. Sts. c. 104, § 2. It comes before this court on exceptions to the directions of the court of common pleas, on a trial before that court ; and the only question is, whether those directions were right.

The revised statutes on this subject, although they enlarged, to some extent, the provisions of the old statutes, and rendered them more definite, were never intended to substitute this summary process of complaint before a magistrate, for a regular action to try a question of title. We think, as the statute now stands, it provides for three cases, well defined : First, where a tenant, whose term or right of possession has expired, holds possession, without right ; secondly, where any forcible entry shall have been made ; or thirdly, where any entry shall have been made in a peaceable manner, and the possession shall be unlawfully held by force. In either of these cases, the process will lie ; but one of them must exist, to maintain it.

The bill of exceptions, in the present case, shows the instructions of the court in matter of law, and enough of the evidence to show the application of those instructions. The court instructed the jury, that this summary process could not be maintained, in the absence of all relation of landlord and tenant, unless there was evidence of an actual forcible entry, or detainer, by violence, or threats of violence, or some act or threat of force, calculated to alarm the complainant or his agent, or deter him, from apprehension of forcible resistance ; and that there was no such evidence of force here, in taking or keeping possession, as would sustain the complaint. The former part of this direction we think was a precise and accurate statement of the law of the case, adapted to enable the jury to pass upon the evidence, and all that the evidence in the case called for. A mere unlawful entry into lands, though it would justify the common averment of *vi et armis*, or force and arms, is not the forcible entry contemplated by the statute. It must be something more, either an original entry or subsequent detainer, with strong hand ; and this may be by the use of actual force and violence, or by menace of force, accompanied by arms and a manifest intent to carry such threat into effect, or by a show of force, calculated to create terror and alarm, by an exhibit on of arms, a display of numbers, or other means manifesting an open and visible determination forcibly to make the entry, or forcibly to resist the entry of another. These principles were

well and concisely stated in the charge of the court. See 1 Hawk. c. 64, §§ 25-30. 1 Russell on Crimes, (1st ed.) 414-418. The latter part of the charge was a remark upon the force and effect of the evidence, which was a question of fact for the jury, and by which they were not bound, because it embraced no direction in matter of law. Perhaps it would have been more regular and conformable to the well known distinction between the relative powers and duties of the court and the jury, to have left it to the jury, on the evidence, whether any such forcible entry or forcible detainer was proved. At the same time, it is proper to add, that as far as the evidence appears, (and the bill of exceptions purports to state the whole of it,) we are fully satisfied that there was no evidence, upon which the jury could have found a different verdict, from that which they did find.

It was contended in the argument, that there was evidence, upon which the jury might have found that the relation of landlord and tenant existed. We can perceive no such evidence. It seems that the defendant entered when the premises were vacant, without and against the consent of the landlord or his agent, and that the latter, after he knew it, at every interview with her, expressed his dissent, and required her to leave the premises. But, if the complaint proceeded upon that branch of the statute—which does not appear—and if the plaintiff wished to submit it to the jury on that ground, he should have raised the point at the trial, and asked for a direction of the court upon it. This point not having been taken at the trial, we think it cannot now be taken at the argument, upon evidence reported for another and distinct purpose.

Exceptions overruled.

AARON F. BROWN vs. JOHN P. LAKEMAN & others.

Where two magistrates meet at the time and place appointed for the examination of a debtor committed on execution, and adjourn to a future day, and only one of them is able to attend again on that day, another magistrate may attend instead of him who is absent, and the two who are thus present may lawfully proceed to examine the debtor and administer to him the poor debtors' oath.

DEBT on a bond for the liberty of the jail limits.

The following facts were agreed by the parties : The defendant, Lakeman, on the 10th of August 1841, was committed to the jail in Ipswich, upon an execution that issued on a judgment recovered against him by the plaintiff, and afterwards gave bond, with the other defendants as his sureties, in the form and with the condition prescribed by the Rev. Sts. c. 97, § 63 ; but he did not surrender himself to the jailer, at the expiration of 90 days, to be held in close confinement.

A citation was duly issued, served on the plaintiff, and returned, informing him that said Lakeman was 'desirous to take the benefit of the law for the relief of poor debtors,' and that the 18th of October 1841, at 10 o'clock, A. M., at the dwelling-house of the jailer in Ipswich, were the time and place appointed for the examination of said Lakeman. On that day, two justices of the peace, and each of the quorum, met at said jailer's house, and made the following order : "It is ordered that this court be adjourned to Thursday, the 28th of October instant, nine of the clock before noon, then to be held at this place." (Signed by both of said justices.)

On the 27th of said October, one of the said justices wrote a letter to said Lakeman, informing him that it would be necessary for him to obtain another magistrate to act in his case on the next day, as he (said justice) must be out of town on business. On the next day, one of said justices, who attended on the 18th of said October, and another justice of the peace and of the quorum, who then attended for the first time, examined said Lakeman, administered to him the poor debtors' oath, and made a certificate thereof to said jailer, under their hands, in the form prescribed by the Rev. Sts. c. 98, § 10.

O. P. Lord, for the plaintiff. Lakeman was not 'lawfully discharged,' within the condition of the bond, and the defendants are therefore liable. The *St.* of 1787, c. 29, contained no provision for an adjournment of the examination of a poor debtor. The justices were first authorized to adjourn, by *St.* 1817, c. 186; but not more than twice, nor more than 24 hours at one time. By *Rev. Sts.* c. 98, § 5, such examination may be adjourned to any convenient time. But there is no provision for the coming in of new magistrates at the adjournment. The provincial *St.* 3 Geo. III. (Anc. Chart. 649,) provided that a citation to the creditor should be made by two justices, quorum unus, and that "such justices, or in case of their non-attendance, then any other two justices, quorum unus," might administer the oath to the debtor. No analogous provision has existed since that statute was revised by *St.* 1787, c. 29.

The adjournment in question was an adjournment of the meeting of the same justices; and two new justices might have administered the oath, in the absence of the two first, with the same legal authority as this oath was administered. The two first justices must have passed upon divers preliminary questions, before they organized as a court and adjourned, viz. whether the time, prescribed by statute, for proceeding to the examination, had arrived, &c.

The statute provisions, as to the discharge of debtors committed on execution, are to be strictly adhered to. *Woods v. Varnum*, 21 Pick. 165. *Farley v. Randall*, 22 Pick. 146. *Trull v. Wheeler*, 19 Pick. 240. *Whitehead v. Varnum*, 14 Pick. 523. The case of *Fisher v. Shattuck*, 17 Pick. 252, is also a strong authority for the plaintiff.

N. J. Lord, for the defendants. The only case, cited in behalf of the plaintiff, which bears at all upon the present, is *Fisher v. Shattuck*. But that case proceeded on the ground, that the statute, which authorized the issuing of the warrant, required that the party should be brought before the magistrate who issued it. There is no similar statute provision applicable to the case at bar.

A debtor, committed on execution, selects the magistrates

Brown v. Lakeman & others.

who are to examine him ; and this he may do at any time before the hour appointed for the examination. The names of the magistrates are not, and need not be, notified to the creditor. *Dunham v. Burlingame*, 2 Met. 271. He therefore has no right to insist that the same justices, who attend at first, shall also attend at an adjourned meeting.

SHAW, C. J. The court are of opinion that the discharge of Lakeman was good. The examination was rightfully commenced before two justices, both of the quorum, and was regularly adjourned, pursuant to their powers. On the day to which the proceedings stood adjourned, one of those who acted on the first occasion attended ; but the other being necessarily absent, his place was supplied by another justice of the quorum, selected by the debtor. By the Rev. Sts. c. 98, § 4, the authority to take the examination and give a certificate of discharge to the debtor is vested in two justices, each to be of the quorum, disinterested, and not related to either party. The selection is to be made by the debtor, because no other mode is directed by law, and no other party has any interest to do it ; and this selection may be made before or on the return day of the notice. If an adjournment takes place, before the examination, and at the adjournment one of the magistrates is prevented, by necessary absence, from attending, we are of opinion that it is within the spirit, and not contrary to any provision of the statute, for the debtor to elect another magistrate otherwise qualified, to take his place ; the one who remains having the custody of the records and proceedings of the first meeting. The creditor acquires no right to have the jurisdiction confined to the two justices, before whom the proceedings commenced ; because it is very clear, that it would be in the power of the debtor to waive the first notice, issue a new notice, and on its return to select two new magistrates, or one of the former and one new one. What would be the case, should both magistrates, after adjournment, be necessarily absent ; whether the minutes, files and records of the former proceedings, could or could not be produced ; we give no opinion.

Judgment for the defendants

INHABITANTS OF IPSWICH vs. INHABITANTS OF TOPSFIELD.

Under *St. 1821, c. 94, § 2*, and *Rev. Sta. c. 45, § 1*, which provide that a citizen, "having an estate of inheritance or freehold, in any town, and living on the same three years successively, shall gain a settlement in such town," he does not gain a settlement by thus living on an estate, which he has in remainder, as tenant of the owner of the preceding estate of freehold. The statutes refer to such an estate as the party has a right to occupy, and not to an estate in expectancy, where there is a preceding estate of freehold in another.

ASSUMPSIT to recover expenses incurred by the plaintiffs in supporting a minor child of Stephen Perkins, as a pauper, whose settlement was alleged to be in Topsfield.

It was agreed by the parties, that the plaintiffs were entitled to recover, unless said Stephen, the pauper's father, had a settlement in Ipswich. The question of his settlement was submitted to the court on the following facts: Thomas Meady, by his last will, which was proved and allowed in May 1809, devised all his real estate to his wife, to hold during her widowhood, on condition that she should support his two youngest sons, John and William, until they should be able to provide for themselves. He also devised all his real estate to his said two sons, their heirs and assigns forever, to be equally divided between them; they to come into possession of the same at the marriage or decease of their mother, whichever should first happen.

The said John and William Meady remained with their mother, and were supported by her, during their minority; and on coming of age, they removed from her. The real estate devised as aforesaid, was situate in Ipswich, and consisted of a house and about three fourths of an acre of upland, a lot of marsh land, and a pew in the south meetinghouse. The testator's widow died unmarried, in the year 1841. On the 4th of December 1835, the said William Meady, by deed of quitclaim, conveyed to said Stephen Perkins one undivided half of the aforesaid real estate, subject to the right of said widow "to improve and occupy the same during her natural life or widowhood."

At the time when this deed was given, said Perkins was n

the occupation of a part of said real estate, as tenant of the widow, and continued so to occupy for more than three years afterwards, viz. until March 1839, under an agreement to pay rent. Before the year 1835, the widow bought a small shop and caused it to be placed on the devised land, near the house ; and in December 1838, she sold it to said Perkins, who occupied it, with the rest of the premises, a few weeks, when it was attached, with all his interest in the premises, and was applied to the payment of his debts. But he never resided nor slept in the shop.

Since the year 1839, all said real estate was occupied by tenants, who paid rent for the whole to the widow or her administrator, up to the time of her decease.

N. J. Lord, for the plaintiffs.

Perkins, for the defendants.

WILDE, J.* Upon the facts agreed, the only question is, whether Stephen Perkins, the father of the pauper, has gained a settlement in Ipswich, under *St. 1821, c. 92, § 2*, which provided that any citizen, twenty one years old, "having an estate of inheritance or freehold, in any town, and living on the same three years successively, shall thereby gain a settlement in such town." And we are of opinion that he has not. In order to gain a settlement by this mode, it must appear that the party resided on an estate in which he had a vested inheritance, or freehold in possession. An estate in remainder—and Perkins had no other estate of inheritance or freehold—is not sufficient to confer a settlement. This is the established principle of settlement law in England, and we think it has been established on the true construction of the English statute. *The King v. Eaton*, 4 T. R. 177. *The King v. Willoughby-with-Sloothby*, 10 Barn. & Cres. 62. And the same construction is to be given to *St. 1821, c. 94, § 2*, and *Rev. Sts. c. 45, § 1, clause 1th*. These statutes refer to such an estate as the party has a

* This and the six following cases were argued at Boston, before all the judges, in January 1843.

Peirce & another v. Pendar.

right to occupy, and not to an estate in expectancy, where there is a preceding estate of freehold in some other person.

Defendants defaulted

WALDO T. PEIRCE & another vs. SIMON PENDAR.

Where the indorser and holder of a note reside in the same place where the note is dishonored, notice of the dishonor must be given to the indorser personally, or at his domicile or place of business, and not through the post office.

P. went with his family to Bangor, in the autumn of 1835, and lived at board, with his family, in different houses in that place, until the autumn of 1836: During this time, P. was often absent on business, and once took his family, for some weeks, to another place: He had a place of business in the counting room of W. & R., and no other place of business in Bangor; and his papers were left, during his absence, in the care of W., and were not taken away till the autumn of 1836: On the 26th of July 1836, a note, which was indorsed by P., fell due and was dishonored, at Bangor, by the maker's refusal to pay it; and it did not appear whether P. was or was not in Bangor, on that day. *Held*, that P., on said 26th of July, had a domicile and place of business in Bangor, at one of which, if he was then absent, notice of the dishonor of the note should have been left.

A note payable to P. or order, and indorsed by P. & R. was lodged in a bank in the city of B. where the maker and the indorsers had a domicile when the note fell due: The note was presented, by a notary public, to the maker for payment, which was refused; whereupon the notary made out a notice for P., directed to him at B., and put it into the post office at B.: In a suit by the holder of the note against P. as indorser, the notary testified that he "was not able to find P. or any body who could tell him where he was; that he inquired of the cashier of the bank, and others, for P.'s residence, but was unable to learn from any one where he then resided:" He did not, however, make any inquiry of the maker or second indorser respecting P.'s residence. *Held*, that the notary had not used that reasonable diligence to ascertain P.'s residence which would excuse the want of legal notice to him of the dishonor of the note.

ASSUMPSIT on a promissory note, dated at Bangor, July 23d 1835, signed by William Bradbury, for \$2177.50, payable to the defendant, or order, in one year from date, and interest, and indorsed in blank by the defendant and by Robert M. N. Smyth of Bangor.

It appeared at the trial before *Wilde, J.* that the note, when it fell due, was in the Mercantile Bank at Bangor; that it was presented to the maker for payment, by a notary public, who, upon the maker's refusal to pay it, made out a written notice, in due form, addressed to the defendant, at Bangor, and placed the same in the post office at that place.

The plaintiffs introduced the deposition of the notary, who deposed, that the note was put into his hands on the 26th of July 1836 ; that he, on that day, presented it to Bradbury, the maker, for payment, who "declined paying" ; that he then "made a notification to Simon Pendar ; but not being able to find him, or anybody who could tell where he was, or where he resided," he "directed the notice to him, and put it into the post office at Bangor, directed to him at Bangor : " That at the time when the note was put into his hands, to be protested, he inquired of the cashier of the Mercantile Bank, and of others, for Pendar's residence, but was "unable to learn from any one where he then resided."

In answer to cross interrogatories, said notary deposed, that he had no personal knowledge of the residence of said Pendar, in 1836, and did not know that Pendar had any place of business in Bangor, in that year.

The plaintiffs also introduced the depositions of William Smyth and John Bright of Bangor.

William Smyth deposed, that the defendant came to the deponent's house in Bangor, on a visit, in the autumn of 1835, with his wife and child, and remained with his wife and child, about three months, and then went to the Franklin House in Bangor, with his family, and remained there a short time ; that he then went to another public house in Bangor, to board, with his family ; and then went to board at the house of J. E. Cadmus, in Bangor, where he left his family, while he went to New York, in May or June 1836 ; that, when he returned from New York, he took his family to Belfast, where he remained some weeks, and returned to Bangor, in August 1836, and "stopped at Cadmus's" ; that he afterwards took his family to Portsmouth in New Hampshire : That the defendant, in the spring of 1836, "had a bond of the Bowdoin College townships, and was trying to effect a sale of them ; and was back and forth, part of the time here," [at Bangor,] "and part of it in Boston, part of it in New York and other places, attempting to make sale of said townships : " That in 1836, the defendant's papers were left in the counting room of the deponent, and his brother Robert

M. N. Smyth, in Bangor, where the defendant "usually did his writing, when in Bangor;" and that the deponent knew "of no other place of business, he had, except there, in Bangor, in 1836:" That all the defendant's papers were left in the deponent's care and kept in the deponent's desk, and were not removed until late in the autumn of 1836: That when the defendant went to Belfast, as above mentioned, the deponent "understood him that it was uncertain whether he should come back or not. He was unstable in regard to his family and had no fixed residence." The deponent was certain, (from a circumstance which he stated,) that the defendant's family was in Bangor, on the 4th of July 1836; but he could not state whether or not the defendant was himself there during any part of July in that year.

John Bright deposed, that he was chief clerk in the post office at Bangor, from 1829 to 1839; that the defendant had a box in that office, in 1836, and that quarterly bills were made out to him from January 1836 to January 1837; that the deponent did not know the defendant's place of residence, and "understood he was moving about from place to place—a kind of speculator, here today, and there tomorrow;" that he was such a man, that "you did not know when he was here, or when he was away. Sometimes he was gone, and when he got back, he had letters and papers in his box. Once he was gone a long time."

On this evidence, the judge advised a nonsuit, which was entered, subject to the opinion of the whole court.

Lunt, for the plaintiffs. The only question in the case is, whether due diligence was used to give the defendant notice of the dishonor of the note. The case is *sui generis*. The defendant had no fixed residence, and nobody in Bangor could tell where he was, or where his domicile or place of business was, on the 26th of July 1836. The question of diligence is settled by the circumstances of each particular case. *Williams v. Bank of U. States*, 2 Pet. 102. Chit. on Bills, (Amer. ed. of 1809,) 201, 202. Bayley on Bills, (1st Amer. ed.) 180. *Sturges v. Derrick*, Wightw. 76. *Eagle Bank v. Chapin*, 3 Pick. 180.

It should have been left to the jury to decide whether due diligence had been used to find out the defendant's place of residence. *Bateman v. Joseph*, 12 East, 433.

If the defendant had been a resident of Bangor, the notice, left in the post office there, might not have been sufficient to charge him. But if the plaintiffs were not bound to give any notice, that which they did give cannot harm them.

N. J. Lord, for the defendant. The evidence shows that the defendant's residence was in Bangor, when the note fell due. If so, then the notice, put into the post office, was insufficient. *Bayley on Bills*, (2d Amer. ed.) 277, and cases cited in *note* (q). *Stephenson v. Primrose*, 8 Porter, 155. *Foster v. McDonald*, 3 Alab. 34. *Davis v. Gowen*, and *Fish v. Jackman*, 1 Appleton, 447, 467.

The evidence would not have warranted a jury to find that due diligence was used to ascertain the defendant's residence. *Beveridge v. Burgis*, 3 Campb. 262. By the law of Maine, where this note was made and was dishonored, the holders, if they did not know the defendant's place of residence, were bound to inquire of the other parties to the note. *Hill v. Varrell*, 3 Greenl. 233. And they cannot recover in this State, without doing all that was necessary to entitle them to recover in Maine. *Williams v. Wade*, 1 Met. 82.

SHAW, C. J. This was assumpsit by the indorsees against the indorser of a promissory note, payable in one year from date. The question is, whether the indorser had due notice of the dishonor of the note, by a notice in writing addressed to him at Bangor, by the notary public, and deposited in the post office at that place.

We are satisfied by the evidence, which is submitted and made part of the case, that the defendant, at the time this note became due, had his domicil and also a place of business in Bangor, and that by the use of reasonable diligence, this might have been ascertained; and that the notary made no inquiries of the other parties to the note, or otherwise used due diligence to ascertain the residence of the indorser.

The only remaining question then is, whether notice by the

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post office was sufficient. The *general rule* * certainly is, that when the indorser resides in the same place, with the party who is to give the notice, the notice must be given to the party personally, or at his domicile, or place of business. *Ireland v. Kip*, 10 Johns. 490, and 11 Johns. 231. *Smedes v. Utica Bank*, 20 Johns. 372. *Lindenberger v. Beall*, 6 Wheat. 104. *Shedd v. Brett*, 1 Pick. 401. *Davis v. Gowen*, 1 Appleton, 447. *Shepard v. Hall*, 1 Connect. 329. Perhaps a different rule may prevail in London, where a penny post is established and regulated by law, by whom letters are to be delivered to the party addressed, or at his place of domicile or business, on the same day they are deposited. *Scott v. Liford*, 9 East, 347. And perhaps the same rule might not apply, where the party to whom notice is to be given lives in the same town, if it be at a distinct village or settlement, where a town is large, and there are several post offices in the different parts of it. But of this we give no opinion.

In the present case, the defendant had his residence and place of business in the city of Bangor, and the only notice given him was by a letter, addressed to him at Bangor, and deposited in the post office at that place. And we are of opinion that this was insufficient to charge him as indorser

Nonsuit confirmed.

TYLER PARSONS vs. BENJAMIN MERRILL, Administrator.

Where a debtor mortgages his goods after they are attached, and dies before they are taken or seized on execution, the attachment is dissolved, by virtue of the Rev. Sta. c. 90, § 105, though the mortgagor's estate is insolvent. And in such case, if the attaching officer deliver the goods to the administrator of the mortgagor, on his demanding them and paying him his fees and charges, as directed by Rev. Sta. c. 90, § 106, the mortgagee, on demand upon the administrator for the goods, and his refusal to deliver them, may maintain an action of replevin for the goods, against the administrator, without first paying or tendering to him the amount paid by him to the officer for fees and charges of attachment.

REFLEVIN of goods which had been attached, on the 13th of June 1842, in suits against Samuel F. Parsons, the defend-

* See *Eagle Bank at Providence v. Hathaway*, ante, 212.

ant's intestate, and which said intestate had conveyed to his father, the plaintiff, by a mortgage, made and recorded on the 25th of said June. This mortgage was made to secure an antecedent debt due to the plaintiff from the intestate, and also a sum of money advanced to the intestate, by the plaintiff, when the mortgage was executed. The intestate died on the 4th of August 1842, and letters of administration on his estate were granted to the defendant on the 16th of the same month. The defendant, shortly after, demanded said goods of the attaching officer, and promised to pay him his legal fees and charges for attaching and keeping them. The officer thereupon gave notice to the keeper, to whose care he had intrusted the goods, that he was thereafter to hold them for the defendant. The plaintiff afterwards, and before he commenced this action, demanded the goods of the defendant, and the defendant refused to deliver them to him. After the commencement of this action, the goods were sold, by agreement of parties; one of the actions in which they were attached, being still pending.

When said mortgage and attachments were made, the intestate was believed to be insolvent, and the plaintiff had previously made an unsuccessful effort, in behalf of the intestate, to effect a compromise with one or more of his creditors, by offering to pay one tenth part of their demands; and in so doing, he assumed to act as the intestate's agent and attorney.

It was agreed that if, upon the foregoing facts, the attachments of said goods were dissolved, and if the mortgage was valid, and this action well brought, then judgment should be rendered for the plaintiff; otherwise, that the defendant should have judgment for a return of the goods, or for their value, deducting the necessary expenses.

N. J. Lord, for the plaintiff. Property under attachment may be mortgaged; *Fettyplace v. Dutch*, 13 Pick. 388; and a delivery is not necessary, if the mortgage be recorded. *Bullock v. Williams*, 16 Pick. 33. By the Rev. Sts. c. 90, §§ 105, 106, attachments are dissolved by the death of the debtor, if administration is taken on his estate within a year, and the administrator is entitled to possession of the goods, on pay-

ing to the attaching officer his fees and charges. But he cannot hold them against the mortgagee.

Roberts, (*Ward* was with him,) for the defendant, suggested that the attachment was not dissolved in this case, as it was not within the spirit and intent of the Rev. Sts. c. 90, § 105, that upon a debtor's decease, his property should be taken from one lien creditor and be given to another. That, however, will be the effect of the statute, if the plaintiff can maintain this action. The purpose of the statute is, that the property shall be brought into a general fund for all the creditors of the deceased. The plaintiff cannot maintain replevin against the defendant, as he did not tender to him, before action brought, the amount which he paid to the officer for charges of attachment. The defendant had a right to retain the goods, on that account, if on no other.

The mortgage was fraudulent and void, as against the intestate's creditors. The facts show that the plaintiff knew the intestate was insolvent, when the mortgage was made. The object of it was, therefore, to defraud and delay other creditors. *Roberts* Fraud. Con. 593, 594. *Babcock v. Booth*, 2 Hill's (N. Y.) Rep. 181 *Hawes v. Leader*, Cro. Jac. 270.

Lord, in reply. The intestate had a legal right, while he lived, to prefer one of his creditors. If he had been brought under the operation of the insolvent laws of 1838, c. 163, and 1841, c. 124, the attachments might have been saved, and the property been applied, by his assignees, towards the payment of all his debts. But no such provision has been made in alteration of the Rev. Sts. c. 90, § 105; and the mortgage to the plaintiff, being on good consideration, is not fraudulent against the other creditors. The intestate left only an equity of redemption, which the defendant could reach.

SHAW, C. J. The decision of this case appears to us to depend upon a few plain provisions of law. It is agreed that a demand was made by the plaintiff, on the defendant, for a delivery of the goods, which was refused, before the action was commenced.

The fact that the goods were under attachment did not prevent the owner from making a conveyance of them by sale or

mortgage. *Fettyplace v. Dutch*, 13 Pick. 388. *Arnold v. Brown*, 24 Pick. 89. *Grant v. Lyman*, 4 Met. 470. In this case the consideration of the conveyance is not contested. Then by the death of the debtor, before the goods were taken or seized on execution, and administration taken within one year, the attachment was dissolved. Rev. Sts. c. 90, § 105.

The mortgage, having been duly made and recorded, was good without actual delivery of the goods ; *Bullock v. Williams*, 16 Pick. 33 ; and would have constituted a valid hypothecation, had they remained in the possession of the mortgagor. When, therefore, the administrator paid the expenses to the attaching officer, and took the goods into his own possession, for the purpose of administration, as he might by Rev. Sts. c. 90, § 106, he still held them subject to the valid mortgage made by his intestate to the plaintiff. He had a right to hold the goods, subject to such mortgage, and if they had been of greater value, than the amount for which they were mortgaged, it would have been for the benefit of the estate that he should do so. It was a right to redeem, for the benefit of the general creditors, and to take the goods from the attaching officer, for that purpose, on payment of the fees ; but he could not defeat or set aside the mortgage. No doubt the general object of the statute was to defeat that particular attachment, and so bring the attached property into the general fund, as assets, and thus secure a more equitable distribution ; and this will be the result, when there is no conveyance or mortgage, subsequent to the attachment, or when the attached property exceeds in value the amount for which it is mortgaged. This precise case was not probably in the contemplation of the legislature ; but we think it comes within the statute provisions which, in their general operation, are beneficial

It was said that at all events the action could not be maintained, without first tendering to the defendant the amount which he had paid to the attaching officer for his fees. If indeed it turns out, that the goods are worth no more than they were mortgaged for, so that the estate, represented by the defendant, derives no benefit from his payment, it would be very equitable for the plaintiff, to reimburse him that expense. But when it

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is relied on, as a condition precedent to maintaining the action, it is a very different question, and it becomes necessary to examine the legal grounds of such claim. The administrator, in paying such expenses, is presumed to act for the benefit of the estate, either because he is ignorant of the mortgage, or under a belief that the right of redeeming was of value to the estate, or intending to contest the validity of the mortgage. He was under no obligation to do it, and the fact of doing it shows, in the absence of other proof, that it was done for the estate; and here is no proof that it was done at the request or for the benefit of the mortgagee. In the absence of any legal obligation, or of any request, express or implied, from the plaintiff to the defendant, to pay those expenses for his account, we can perceive no ground, on which their reimbursement can be held to be a condition precedent to maintaining the action.

Defendant defaulted, and judgment for nominal damages.

EDWARD UPTON vs. ABIEL HOLDEN.

Where a collector, appointed by commissioners under the Rev. Sta. c. 115, regulating "proceedings for improving meadows," &c., has a warrant from such commissioners, lawful on its face, directing him to collect assessments made by them on the proprietors of meadows, &c., and he seizes and sells the property of such proprietors, pursuant to his warrant, he is not liable to an action of trespass, although the proceedings previous to the issuing of the warrant were not such as authorized the commissioners to make the assessments. Such warrant is his sufficient justification

TRESPASS for taking and carrying away the plaintiff's goods. The defendant justified under a warrant, issued by commissioners appointed by the court of common pleas, under the law (Rev. Sts. c. 115,) regulating 'proceedings for improving meadows, swamps and low lands.'

At the trial, in the court of common pleas, at the last March term, it appeared that Henry Bancroft and others presented a petition to said court, at the March term thereof, 1839, representing that they were owners, and a majority in interest, of certain tracts of meadow land on Saugus River, containing between 300 and 400 acres, known by the name of Reedy Meadows,

and that by clearing said river, and opening proper ditches leading thereto, the owners of said lands would be enabled to procure therefrom a great amount of peat, for fuel; and therefore praying said court to appoint commissioners to view said lands, and to perform all acts which would enable the proprietors of said lands to carry into effect the contemplated design, agreeably to the statute in such case made and provided.

It further appeared that such proceedings were had on said petition, that said court, at June term 1839, granted the prayer of said petition, and appointed Asa T. Newhall, Ebenezer King and Edmund Parker, commissioners, and empowered them "to determine and prescribe the measures to be adopted" for the purpose of making the "improvements" aforesaid, in said meadows, "and the means of executing the same, according to the provisions of the law": That the said commissioners, on the 15th of May 1840, issued a warrant, under their hands and seals, directed to the defendant, wherein (after reciting their appointment and proceedings) they set forth an apportionment, among the several proprietors of said meadows, including the plaintiff, of the expense of the improvements thereof, made under their direction, and of executing their commission, and requiring the defendant to levy and collect of the proprietors, named in the warrant, the several sums therein set against their respective names, and to distrain the goods and chattels of any one of them who should neglect or refuse to pay the same, after demand of payment thereof made by the defendant.

It also appeared that the defendant, by virtue of said warrant, and after demand on the plaintiff for payment of the sum therein set against his name, and after the plaintiff's refusal to pay the same, seized and sold the goods described in the plaintiff's writ.

The plaintiff objected, that said warrant did not afford a justification to the defendant, because the order of the court to said commissioners did not describe said meadows, or any part thereof, as situate in this county; nor set out, specifically, the improvements proposed to be made; nor aver that the court had made any adjudication that the improvements prayed for would be for the general benefit of the owners of the meadows; nor

show that the court heard the petitioners ; nor that a majority in interest of the owners of the meadows applied for the appointment of commissioners. All these objections were overruled.

The plaintiff then offered evidence to prove that the commissioners did not give the proprietors of the meadows an election to do the work directed by the commissioners to be done ; that they did not appoint suitable persons to do said work ; that the plaintiff had no notice of the pendency of the original petition of said owners ; that the commissioners did not give notice to a majority of said proprietors, before making the assessment ; that a majority in interest of said proprietors did not join in the original petition ; that certain notices, ordered by said commissioners to be given, were not given ; and that the plaintiff was not a proprietor of any of the lands upon which improvements were made, or which were described in the original petition.

The presiding judge rejected this evidence. A verdict was returned for the defendant, and the plaintiff alleged exceptions.

N. J. Lord & Ward, for the plaintiff.

Huntington & Newhall, for the defendant.

DEWEY, J. The objections taken to the proceedings of the commissioners are not open to the plaintiff in this action. The defendant justifies as a collector of taxes or assessments, made upon the proprietors of Reedy Meadows, to reimburse the expenses incurred in draining said meadows. The general authority for proceedings in cases of this nature is found in the Rev. Sts. c. 115. Sect. 8 provides that the commissioners may appoint a collector of the moneys assessed, and shall give him a warrant to collect the same, and that such "collector shall have the same power, and shall proceed in like manner, in collecting the said assessments, as may be provided for the collecting of town taxes."

No exception is taken to the form of the collector's warrant, or to the manner of his proceedings under it. The collector holds a warrant apparently lawful, and coming from authority which apparently has jurisdiction over the subject matter. This, in cases of collectors of town taxes, is held a sufficient justification in an action of trespass for a levy under such warrant.

Colman v. Anderson, 10 Mass. 118. *Stetson v. Kempton*, 13 Mass. 283. We think the same rule applies to cases of collectors of assessments, appointed by commissioners under the Rev. Sts. c. 115, "for improving meadows," &c. Full provision is made in that chapter, § 16, for all persons finding themselves aggrieved by any doings of the commissioners, to correct the error by an appeal to the court of common pleas, which has, by § 17, full power, on such appeal, to make such order therein, as law and justice shall require. And by § 19, the further privilege is given of a bill of exceptions, by which the case may be removed to this court, if any questions arise in matter of law.

Whether there be also a further remedy against the commissioners themselves, who may issue the warrant, where the previous proceedings have been irregular, is a question we have not considered. We think the warrant is a sufficient justification to the collector.

Exceptions overruled.

BENJAMIN GOODRIDGE vs. JONATHAN DUSTIN.

Parties to an action of trespass *quare clausum fregit* submitted the determination of the action to referees, under a rule of court, with an agreement that they should "settle the division line between the *locus in quo* and the land of the defendant." The referees made their award, "that the division line between the estates of the parties be fixed and established," by certain boundaries specifically described in said award; and this award was returned to the court, accepted and recorded. *Held*, that this record was conclusive on the parties, and that in a writ of entry afterwards brought by one of them against the other, to recover land on the demandant's side of the line thus established by the referees, the tenant could not be permitted to show that the referees erred in their judgment, and that the line established by them was not the true boundary line between him and the demandant.

WRIT of entry to recover possession of a parcel of land in Danvers.

At the trial before *Wilde*, J. the demandant offered in evidence the record of a former action of trespass *quare clausum fregit*, brought by him against the tenant. That action was submitted to referees, by a rule entered into in this court, at

November term 1840 ; and it was therein agreed that the referees were "to settle the division line between the *locus in quo* and the land of the defendant." The referees, after hearing the parties, returned their award to this court, and it was accepted, and judgment was thereupon rendered for said Goodridge. The award was, *first*, that said Dustin was guilty of the trespass alleged against him in said Goodridge's writ, and that said Goodridge recover damages and costs ; and *secondly*, "that the boundary or division line between the estates of said Goodridge and said Dustin, in Danvers, on the southerly side of the Reading road, and westerly of Foster Street, be fixed and established " as specifically and minutely stated in said award.

It was admitted by the tenant, that if the line established by the referees was the boundary line between his land and that of the demandant, the latter was entitled to recover possession of the premises demanded in his writ.

The tenant offered to prove that the true boundary line between the lands of the parties was not that which was fixed by the referees, and that they erred in judgment, on the evidence submitted to them, and exceeded their authority, in the award made by them, as appears on the face of the papers.

The judge excluded this evidence, and ruled that the award and the record of the judgment aforesaid were conclusive evidence of title in the demandant up to the time fixed by the referees.

A verdict was returned for the demandant. Judgment to be entered on the verdict, if said ruling was right ; otherwise, a new trial to be ordered.

N. J. Lord, for the tenant, cited *Whitney v. Holmes*, 15 Mass. 152. Kyd on Awards, 61.

Proctor & Ward, for the demandant, cited *Doe v. Rosser*, 3 East, 15. 3 Phil. Ev. (4th Amer. ed.) 1037. *Watson on Arbitration*, 38, 147. *Davis v. Havard*, 15 S. & R. 165. *Carey v. Wilcox*, 6 N. Hamp. 177. *Jackson v. Dysling*, 2 Caines, 198. *Robertson v. McNeil*, 12 Wend. 583. *Jones v. Boston Mill Corporation*, 6 Pick. 148.

HUBBARD, J. This is a writ of entry, and to maintain his

action the demandant offered in evidence the record of a former suit between the same parties, who are adjoining owners; and it is admitted that if the line established by the referees, whose report is a part of the record, is the boundary line between the parties, the demandant is entitled to recover possession of the premises demanded in his writ. The tenant offered to prove that the true boundary line between the parties was not that fixed by the referees, but that they erred in their judgment on the evidence submitted to them, and exceeded their authority, in the award made by them, as appears on the face of the papers.

This evidence was rejected by the judge who presided at the trial, and a verdict was returned for the demandant. If this ruling was wrong, the verdict is to be set aside, and a new trial granted.

The former action between these parties was trespass *quare clausum fregit*, and while pending in the supreme judicial court, they agreed to refer it to the determination of three arbitrators, who were to settle the division line between the *locus in quo* and the land of the defendant.

After meeting and hearing the parties and viewing the premises, they decided that the boundary or division line between the estates of the parties be fixed and established, as therein described; which award was returned into court, and accepted and recorded.

As to the objection, that the referees exceeded their authority in making such award, and that it appears on the face of the paper, we think it is untenable. The action of trespass *quare clausum fregit* was referred to the referees, and they were also to settle the division line between the parties. The authority thus conferred upon them they do not appear to have exceeded, but to have executed strictly.

It is a well settled principle, that awards are not to be set aside for errors in judgment merely, committed by the arbitrators. The parties choose their own judges, relying upon their judgment; and if awards were to be set aside or opened, for such errors, no award would be conclusive, and the very object of entering into a rule of reference would be defeated. But it

we contended in this case, that if this award is conclusive between these parties, it will operate as a conveyance of land ; that land cannot be conveyed by the mere judgment and determination of arbitrators ; and that estates can only be passed by deed. And to support this position, the counsel rely mainly, if not wholly, on the case of *Whitney v. Holmes*, 15 Mass. 152. But we think the present action may be determined upon principles not necessarily inconsistent with that decision. That appears to have been a parol award, which was offered in evidence, while this was an award made under a rule of court, and returned into the same, and accepted and recorded. In the former suit between the parties now before the court, the question of boundary was a fact in dispute, and might have been tried by the jury upon proper pleadings ; and for the purpose of settling it the reference took place. An award was then made on the specific subject, was returned into court, and accepted and recorded. An award thus accepted and recorded is in our judgment equally valid and conclusive with a verdict founded on the same fact distinctly put in issue between the parties ; and a judgment on an award made and recorded is a good bar to another action founded on the same fact or title. *Doe v. Rosser*, 3 East, 15. *Arnold v. Arnold*, 17 Pick. 1. Jackson on Real Actions, 275. *Outram v. Morewood*, 3 East, 346. *Kitchen v. Campbell*, 3 Wils. 304.

Without intending to controvert the position, that land cannot be conveyed by the mere determination of arbitrators, and that estates can only be passed by deed, yet we think a just distinction may be made between questions of title, and those of boundary, though the one may occasionally be involved in the other. In the matter of boundary the question is, which is the true line of division between adjoining estates, and the removing of the uncertainty attending the settling of the line can as well be done by an arbitration and award, as by deed ; and the effect of such a judgment is not to change the titles to a portion of the respective estates, but to confirm each in his own estate ; and by such award, the parties shall be concluded as to their boundaries.

The case of *Whitney v. Holmes*, 15 Mass. 152, which has been relied upon by the tenant, does not appear to have been thoroughly argued; and the agreement proved in the case seems to have been treated by the counsel as a license to enter upon the defendant's land; and so considering it, we think the reasoning of the court to be entirely correct. But the court, in the introductory part of their opinion, speaking of the agreement, say, "in order to give it this effect, it should appear that the agreement operated as a conveyance of the defendant's soil to the plaintiff, which cannot be pretended; for no estate can pass, according to our statutes, but by deed. Or it must have amounted to an estoppel, which has not been insisted upon; no man being barred of his right, by way of estoppel, but by record or deed." We are of opinion that here too restricted an operation is given to the construction of awards between parties, though neither records nor deeds. In our judgment, an award respecting lands, though it will not have the direct effect of conveying lands, will yet conclude the parties from disputing the title or boundary which is distinctly settled by the award, and that it shall operate by way of estoppel. Not that the land passes by the award, but that by force of the agreement of the parties, they shall not be permitted to allege facts contrary to those directly established by the award; and that like an estoppel, it is mutual between the parties. And with this agrees the current of authorities. 1 U. S. Digest, Arbitrament and Award, 551, 571.

So far therefore as the case of *Whitney v. Holmes* maintains a contrary doctrine, we think it cannot be sustained.

Some cases have even gone so far, that on a *mere question of boundary*, a parol submission and award have been held conclusive between the parties; but as to this, we express no opinion

Judgment on the verdict.

WILLIAM ASHBY & others vs. THE EASTERN RAIL ROAD COMPANY.

A deed conveying a wharf, which extends from the upland below high water mark, and bounding on an arm of the sea in which the tide ebbs and flows, passes the flats as parcel, and also as appurtenant to the wharf.

Where the proprietor of a wharf, which is bounded on an arm of the sea, claims the flats to the channel, viz. to low water mark, the burden of proof is on him to show that there was an original natural channel, from which the sea did not ebb at low water, and that such channel, or low water mark, was so far below his wharf as to include the flats which he claims.

Where the value of a wharf is impaired by the construction of a rail road across the flats below it, the owner is entitled to recover of the proprietors of the rail road the damages thus sustained by him.

A., the owner of a wharf, entered into a written agreement, not under seal, with B. and C., that certain machinery and fixtures should be erected on the wharf, at their common expense, and that the profits of the business to be carried on there should enure to their common benefit: A rail road was afterwards constructed across the flats below the wharf, and A. B. and C. joined in a petition for a jury to assess the damages thereby sustained by them, and alleged in their petition that they were the owners of the wharf, &c. *Held*, that if the jury believed, on all the evidence before them, that the petitioners had such an interest in the estate as entitled them to damages, and that they suffered damages jointly, then they properly joined in the petition, and were entitled to recover.

THIS was a proceeding upon a petition to the county commissioners for a jury to assess damages, alleged to have been sustained by the petitioners, by the laying out and construction of the eastern rail road over their land in Salem. The commissioners issued a warrant to the sheriff, requiring him to summon a jury to hear and determine the matter of the petitioners' complaint, and the sheriff performed the duty thus required of him. The jury gave a verdict for the petitioners, which was returned to the court of common pleas, and was set aside by that court, upon exceptions taken by the respondents to the instructions given to the jury by the sheriff, at the hearing. The petitioners thereupon alleged exceptions to the decision of that court.

The facts of the case, and the instructions given to the jury, are stated in the opinion given by the chief justice.

Ward, for the petitioners.

N. J. Lord, for the respondents.

SHAW, C. J. Two exceptions were taken to the rulings of the sheriff, on the trial before the jury. The petitioners claimed damage, amongst other things, for certain flats, that is, land flowed by tide water, belonging to them and taken and traversed by the rail road. The petitioners claimed the flats in question, as parcel of or appurtenant to their estate situated in Salem on the westerly side of a cove, river, or arm of the sea, flowed by the tide, on which they had a wharf extending easterly below high water mark. The rail road passed within about thirty or forty feet of the head of this wharf. The respondents contended, that the flats of the petitioners did not extend so far easterly as the line of the rail road; and that the rail road did not cover any part of the flats. This depended upon the construction of the deeds under which the petitioners claimed, and whether those deeds of the upland estate carried the right of flats, as parcel or appurtenant; and if so, what was the true line, by which that right of flats was bounded.

1. On the first point, the sheriff instructed the jury, "that by the construction of the petitioners' title deeds, they owned the flats to the channel, or low water mark."

We are of opinion that this direction was right. By a regular succession of deeds, conveying the title, and extending back to 1805, the estate is described as a wharf bounding on South River. It appears that this wharf extended from the upland, below high water mark, and that South River is an arm of the sea, in which the sea ebbs and flows. We are therefore of opinion, that the flats passed as parcel, by force of the colony ordinance, and also as appurtenant to the wharf. *Anc. Chart. 148. Doane v. Broad Street Association*, 6 Mass. 332. *Rust v. Boston Mill Corporation*, 6 Pick. 158.

2. Upon the other point, the sheriff instructed the jury, "that if they were left in doubt, upon all the evidence, where the natural channel was, if there were such a channel, then the petitioners were entitled to go to the centre of the ancient river."

The court are of opinion, that this direction was incorrect, and that the exception was well taken. If this tract of flats, called South River, had no channel running through it, that is,

no depression, from which the tide did not ebb at low water, then it must have been a cove, and all the riparian proprietors on the cove would divide the flats amongst them, by lines drawn from their respective lands to the channel, running by the mouth of the cove, from which the tide flows into the cove, giving each a line on the channel, proportioned to his line on the cove. *Rust v. Boston Mill Corporation*, 6 Pick. 158. If there was an original natural channel, through the cove or river, formed by a stream of fresh water falling into it above, or otherwise, then it was a river or arm of the sea, through which the tide ebbed and flowed, and each riparian proprietor was entitled to the flats, to such channel or stream, if not exceeding one hundred rods.

In reference to the case of the fact being left in doubt by the evidence, the jury should have been instructed, that the burden of proof was upon the petitioners, to prove their title to the soil of the flats claimed, and for that purpose to prove that the original channel or line of low water mark extended so far, as to include the soil, or some part thereof, over which the rail road was laid; and that if they failed to establish their title by such proof, their claim for damages on that ground could not be sustained.

The court are therefore of opinion, that the decision of the court of common pleas, declining to accept this verdict and render judgment upon it, was correct, and that this result be certified to the county commissioners, to the end that a warrant may duly issue for a new trial.

Another jury, summoned and empannelled by the sheriff, under a new warrant from the county commissioners, gave a verdict for the petitioners. The respondents filed exceptions to the instructions, given by the sheriff to this jury, but they were overruled by the court of common pleas, and the verdict was accepted by that court. The respondents brought the case again before this court, on exceptions to the decision in the court below. These exceptions, (which fully appear in the

opinion of the court,) were argued and overruled at the November term, 1843.

N. J. Lord, for the respondents.

Ward, for the petitioners.

SHAW, C. J. It appears by the bill of exceptions allowed by the sheriff, that at the trial before him, the evidence of legal title to the land, over which the rail road passes, was a deed showing the fee to be in William Ashby, one of the petitioners, alone. But it further appeared, that an agreement in writing not under seal, had been entered into, between said William Ashby and two other petitioners, by which it was stipulated, that certain machinery and fixtures were to be erected on the premises, at their common expense, and that the profits of the business, to be carried on there, were to enure to their common benefit.

The respondents requested the sheriff to instruct the jury, that as the title to the estate appeared by the deeds to be in William Ashby alone, the three petitioners were not entitled, as owners, to recover in this process, and that the jury must find for the respondents. This instruction the sheriff declined giving; and he instructed the jury, "that if they believed, upon all the evidence, that the petitioners really owned the estate, and suffered the damage, if any, jointly, they were properly joined in this petition, and entitled to recover."

This direction, taken in connexion with the subject matter and the state of the question, was, we think, correct. The sheriff was not called on to give an opinion upon an abstract question of legal title, upon deeds. The question was, whether the petitioners had such interests in the estate, as would entitle them to recover for damage, done by the rail road, which impaired its value.

In *Dodge v. County Commissioners of Essex*, 3 Met. 380, it was held that parties interested in land, not taken for a rail road, but so near as necessarily to be damaged by it, are entitled to damages.

It is settled by a series of decisions, and now by statute, that to recover damage done to real estate by a highway or rail road.

it is not necessary that the claimant should be tenant of the freehold, or legal owner of the estate. It is sufficient, that he has an interest, which will be impaired by the public work, so that he must sustain a loss by it. Rev. Sts. c. 24, §§ 31, 32. It is in this sense that the sheriff is to be understood in his instruction to the jury, to determine whether the petitioners were owners of the estate, and had suffered the damage, if any, jointly ; and so understood, it was correct. Notwithstanding, therefore, it appeared by the deed, that William Ashby was owner in fee of the estate, still if by force of the agreement entered into by him with the other petitioners, regarding it as a declaration of trust, or a demise, they became interested in the use and occupation of the estate, and in the machinery and fixtures set up and put in operation therein, then they were owners so far as to establish a claim for damages, if any had been sustained ; and this was a proper question for the determination of the jury, upon the evidence.

If the petitioners were interested in one and the same estate, whether such interests were joint or several, it is within the spirit, if not within the express provision of the statute, that they should join in one petition for the assessment of damages. Rev. Sts. c. 24, § 48. This is manifestly for the benefit of the respondents, and is so regarded by the statute, which provides, that when the damages are several, the jury, after determining the whole damage, may apportion it amongst the respective parties, who have sustained damage ; or if any one has joined in such petition, whom they find to have sustained no damage, the jury may so report, and yet assess damages for the others. Rev. Sts. c. 24, § 50.

Judgment of the court of common pleas, accepting the verdict, affirmed

CALEB JONES vs. NATHANIEL STEVENS.

The report of an auditor, appointed under the Rev. Stat. c. 96, § 25, to state the accounts of parties to an action, is *prima facie* evidence on the trial of the action by a jury, and changes the burden of proof.

When, on the trial of a cause, a party offers in evidence an auditor's report, which contains statements respecting a matter upon which he had no authority to pass, it is within the discretion of the court, to reject the whole report, or to recommit it, or to receive in evidence those parts of it which are admissible, and reject the other part.

Those matters of defence, which go in bar of an action, or which are not matters of account, are not to be passed upon by an auditor; and, if done without consent of parties, should be stricken from his report, or the report should be recommitted or rejected. But where the evidence offered bears directly or incidentally on the matters of account, the auditor should examine it, and may state it, if he deem it necessary to render his report intelligible; and if both parties go into such evidence before him, his report will not be rejected merely for the reason that he states facts respecting matters which go in bar, and his conclusions from such facts.

During the trial of an action for work done, &c. in manufacturing cloth, the court, by consent of parties, appointed four men 'to estimate the cost of manufacturing, &c., the pieces produced,' who returned into court written estimates of such cost; and the case was afterwards sent to an auditor to state the accounts of the parties. *Held*, that said estimates were not in the nature of an award, and binding on the parties; and that the auditor might receive evidence to vary and control those estimates, and might state the accounts according to such evidence.

Where, in the trial of an action between A. and B., it was made a question whether A. and C. were partners in the matter of the suit, and ought to have joined in bringing the action, letters written by C. to B., but not communicated to A., are not admissible in evidence.

ASSUMPSIT for work and labor, and materials found, in manufacturing cloth for the defendant in the years 1838 and 1839.

Trial in the court of common pleas, at the last September term. At a previous term of that court, an auditor had been appointed to hear the parties, and examine their vouchers and evidence, and to state the accounts, and make report thereof. The auditor heard the parties, and returned his report.

The account stated by the auditor was thus :

Dr.	Nathaniel Stevens in account with Caleb Jones,	Cr.
1838. To manufacturing, &c., the goods specified in the bill of particulars, \$ 13.629.61		1838. By amount of your account of all credits, \$ 11.735.54
In the above sum is included the use of the machinery, \$ 1.440.00		By balance of this account to new account, \$ 1.894.07
The rent of the factory, \$ 1.350.00		
Repairs charged in Stevens's bill of credits to Jones, but paid by Jones, \$ 74.00		
By balance to new account, \$ 1.894.07		
		<u>\$ 13.629.61</u>

The defendant objected to the admission of this report in evidence, on the ground that the auditor had passed upon certain questions of fact, upon which he was not competent to pass ; but the objection was overruled.

One ground, on which the defendant placed his defence, was, that the work done for him was done by the plaintiff and John Howarth jointly, and that if he was indebted at all, it was to them jointly, and that this action could not be maintained ; and he contended, that the finding of the auditor upon the question, whether there was a partnership between the plaintiff and Howarth, should not be submitted to the jury. The presiding judge permitted the auditor's report to go to the jury, and instructed them, " that so far as it found that any labor was performed by the plaintiff for the defendant, and so far as it found the value of the services thus rendered, it was *primâ facie* evidence, and that the burden of proof was on the defendant, if he would impeach it ; that if they found the fact to be, that the plaintiff had performed any such labor, the law implied a promise, on the part of the defendant, to pay him for such labor ; that if the work was performed by the plaintiff and Howarth jointly, the plaintiff was not entitled to recover in this action ; that it was proper for the jury to consider the facts stated in the 4th and 7th paragraphs of the report, (the instructions of the court having been particularly requested, in reference to those paragraphs,) that it was not competent for the auditor to pass upon the question of partnership between the defendant and Howarth ; and that the jury should exclude from their consideration any part of the report which had reference to that subject."

The defendant requested the judge to instruct the jury, that upon the facts found by the auditor, in relation to the use of the mill and the machinery mentioned in his report, the plaintiff was not entitled to recover any thing for the use thereof. But the judge instructed the jury, " that upon those facts, the auditor rightly included those items, in estimating the value of the services rendered by the plaintiff."

The defendant moved the court to recommit the report to the auditor, or to reject the same, upon the ground that the auditor

had received incompetent evidence at the hearing before him, as appears from the 15th paragraph of his report. This motion was overruled.

The defendant then offered sundry letters written to him by said Howarth, as evidence tending to show a partnership between Howarth and the plaintiff. But the judge rejected them ; no evidence being offered that those letters were shown to the plaintiff, as they were received.

The jury returned a verdict for the plaintiff, and the defendant alleged exceptions to the said rulings and instructions of the judge.

The paragraphs in the auditor's report, which are above referred to, were as follows :

“ 4. That the said John Howarth entered upon the business of manufacturing said wool at said mill, at the same time with said Jones, hired some of the workmen, made entries in the books, and continued engaged in the business of manufacturing, in the same manner that the said Jones did, until about the middle of October 1838, when he sailed for England, on business not connected with the work at the factory, but relating to a patent machine, in which said Howarth, the said Stevens, N. F. Jones, and N. W. Hazen were interested.

“ 7. That the books of said factory, relating to the manufacture of said Stevens's wool, were kept in the name of said Caleb Jones ; and repairs on the machinery, and articles supplied for the business, were charged to said Jones, and paid for by him ; and certain receipts for such repairs and supplies were produced by said plaintiff and identified by witnesses, and are among the documents accompanying this report.

“ 15. In the hearing before the auditor, it was admitted by the parties, that at the September term of this court,” (common pleas,) “ 1841, the court, by the consent of said parties, during the hearing of said case, appointed James Howarth, Joseph Buckley, Ebenezer Sutton, and E. J. W. Hale, ‘ to estimate the cost of manufacturing, scouring, and napping the pieces produced, and superintendence ’ ; that they considered the subject committed to them, and returned to the court certain estimates

in writing, which are among the documents accompanying this report ; and it was in evidence to the auditor, that the ' pieces ' produced to said committee, and upon which they made their estimate, were, the one a piece of fine, and the other a piece of coarse flannel, manufactured by the plaintiff, at said factory ; and said estimates were admitted by the auditor, as evidence, and considered by him in the hearing before him. The plaintiff produced certain witnesses to the auditor, to prove the cost of manufacturing, &c. the flannels mentioned in the plaintiff's bill of particulars. The defendant's counsel objected to their admission, on the ground that the written estimates aforesaid were the only evidence which could legally be admitted to prove any of the matters contained in said estimates. The auditor was of opinion, that other and further evidence was admissible, and examined the witnesses."

N. J. Lord & O. P. Lord, for the defendant.

Ward & Perkins, for the plaintiff.

HUBBARD, J. This was an action of assumpsit for work and labor, and for materials furnished. One ground of defence relied on was, that the labor was done, if at all, jointly by one Howarth and the plaintiff, as partners ; and that the materials were found by them, and consequently that the action could not be maintained by the plaintiff alone. This was denied by the plaintiff.

The case went to an auditor, either by consent, or by order of court. From an examination of his report, which makes part of the case, and from the statement of counsel, it appears that both parties went into evidence before him, whether the work and materials charged were furnished by the plaintiff, or by him and Howarth. And upon this evidence the auditor formed an opinion, as appears in his report. When the case came on for trial, the defendant objected to the plaintiff's reading the report in evidence, on the ground that the auditor had passed on the question of partnership, and contended that it should either be rejected or recommitted. But the judge permitted the report to go to the jury, and instructed them, that while it was proper for them to consider the facts stated in those paragraphs

of the report, yet, as it was not competent for the auditor to pass upon the question of partnership, they should exclude from their consideration any parts of the report which had reference to that subject.

The language of the instructions, as reported, is not very distinct; but we understand by it, that the judge considered that the facts, as stated in that part of the report, so far made a part of it, that they might be read to the jury; but that the opinion formed by the auditor upon those facts, in relation to the partnership, should be excluded from their consideration.

We are of opinion, that it is proper for the presiding judge, on hearing objections to the report of an auditor, to accept or reject it, or to recommit it; or, as in the case of a deposition, he may reject parts of the report, which he deems improper to go to the jury, and receive the residue; and that he is not obliged, at all events, to reject or recommit it, for partial errors. It is a matter which lies within his judgment, in the first instance.

And in the case at bar, on looking at the facts stated in the report, and bearing in mind, that both parties went into evidence before the auditor, on the subject of the partnership, we see no sufficient reason for setting aside the verdict for the reason that the judge did not recommit or reject the report. And we think the course adopted by him, in rejecting the conclusions drawn by the auditor, while he retained the facts upon which the conclusions were formed, was within the exercise of his discretion, and that his decision in this respect was not erroneous.

Those matters of defence which go in bar of the action, or which are not matters of account, are not to be passed upon by an auditor; and, if done without consent of parties, should be stricken from the report, or the report itself should be recommitted or rejected. But where the evidence offered bears directly or incidentally on the matters of account, there the auditor is called upon to examine it, and may state it, if he thinks it necessary to render his report intelligible; though he is not required, as a matter of course, to detail the testimony at length; it being kept in mind, that the report is but *prima facie* evi-

dence, and may be contradicted and rebutted by other testimony, or by the reëxamination of the same witnesses or documents.

In the present case, it would seem to us, that the auditor was not necessarily required to form a definite judgment on the subject of the partnership, and to incorporate the same into his report, as he could state the accounts in the alternative, according as they were affected by the fact of partnership or no partnership. But the evidence having been offered by both parties, and of course pressed by the defendant whose endeavor was to establish the partnership, we see no sufficient ground for rejecting his report, for the reason that he presented the facts brought before him, with his conclusions.

It was also objected, by the defendant, to the charge of the judge, that he instructed the jury, that the report of the auditor, in respect to the value of the plaintiff's services for labor performed for the defendant, was *primâ facie* evidence, and that the burden of proof was on the defendant, if he would impeach it; the defendant maintaining that the burden of proof was not shifted by reason of the report, but that the condition of the parties, as to the proof of the case, remained the same as if no report of an auditor had constituted a part of it. But we cannot agree to this position. It was incumbent on the auditor, in stating the accounts, which consisted, for a considerable part, in services performed, to ascertain the value of those services; otherwise he could not introduce the services as items of account. And the report being made evidence by the statute, it necessarily shifted the burden of proof; for being *primâ facie* evidence, it becomes conclusive where it is not contradicted or controlled. And in *Allen v. Hawks*, 11 Pick. 362, the court say, "another useful and very important effect of a report is, to change the burden of proof." The general rules of practice, on the subject of auditors' reports, are stated with great distinctness, in the above case, and in those of *Lazarus v. Commonwealth Ins. Co.* 19 Pick. 97, and *Whitwell v. Willard*, 1 Met. 216; and it is unnecessary here to enlarge upon them farther.

In regard to the objection raised to the 15th paragraph of the report, we think the appraisalment, made by Howarth, Buckley,

and others, was not in the nature of an award binding on the parties, but was merely evidence tending to show the cost of manufacturing the goods mentioned ; and that it might be varied and controlled by other testimony offered by either of the parties ; and that the auditor did not, in relation to it, admit incompetent evidence.

The defendant also offered in evidence certain letters written by John Howarth to the defendant, which were rejected. As the plaintiff was not a party to the correspondence, and as no evidence was offered to prove that the letters had been communicated to him, as they were received, we cannot doubt that they were properly excluded from the case.

On the view which we have taken of this report, and the accounts as therein stated, we see no such errors in the rulings and instructions of the presiding judge, as make it necessary to disturb the judgment rendered by the court of common pleas.

Exceptions overruled.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME JUDICIAL COURT
FOR THE
COUNTIES OF SUFFOLK AND NANTUCKET,
MARCH TERM 1843, AT BOSTON.

~~PRESENT :~~
PRESENT :

HON. LEMUEL SHAW, CHIEF JUSTICE.
HON. SAMUEL S. WILDE, }
HON. CHARLES A. DEWEY, } JUSTICES.
HON. SAMUEL HUBBARD, }

SAMUEL A. WAY *vs.* ISAAC H. WRIGHT & another

It is a good defence to a writ of *scire facias* against bail, that the principal, after they became his bail, was convicted of a crime, and is imprisoned on sentence. In such case, the bail need not bring the principal into court, on *habeas corpus*, to be surrendered, but they will be discharged on motion.

THIS was a writ of *scire facias* against bail, dated December 11th 1840. The case was submitted to the court of common pleas, on the following facts :

The defendants, on the 22d of February 1840, became bail for Martin T. Draper, in a suit brought against him by the plaintiff, in which suit the plaintiff recovered judgment against said Draper, at the July term 1840, of the court of common pleas in this county, for \$392.73, debt or damage, and costs of suit. Execution issued on said judgment, August 10th 1840, and was delivered to an officer for service, who returned the same wholly unsatisfied, when it was, by law and the precept thereof, returnable, with an indorsement thereon that he had made diligent search for the goods and chattels of said Draper, and also for his body, but could find neither.

Way v. Wright & another.

At the May term, 1840, of the court of common pleas, held in the county of Worcester, said Draper was convicted of the crime of perjury, and was sentenced to five years' confinement at hard labor in the state prison, and has ever since been, and now is, in said prison, in execution of said sentence.

The crime of perjury, of which said Draper was convicted, as aforesaid, was committed in the county of Worcester, in December 1839; and the plaintiff, Way, was the complainant in the prosecution, and a witness on the trial of said Draper for said crime.

The defendants have moved this court for a writ of *habeas corpus*, to be directed to the keeper of the state prison, commanding him to have the body of said Draper in court, at such time as they shall fix upon, that the defendants may, upon payment of the costs of this suit, formally surrender said Draper in court, and be discharged from further liability; which motion has been refused and overruled.

On these facts, the court of common pleas rendered judgment for the defendants, and the plaintiff appealed to this court.

This case was argued at the last March term.

Crowninshield, for the plaintiff.

Washburn, for the defendants.

HUBBARD J. The original defendant, Draper, being removed beyond the control of his bail, the plaintiff contends that this is an avoidance, and that the present defendants should be charged on their bond; and although their inability to surrender him arises from his confinement in the state prison, yet that this furnishes no legal defence to the action.

Numerous authorities have been cited by the counsel, in the argument of this case. Many of them, however, have only a collateral bearing on the question to be decided. They relate to certified bankrupts; to debtors who are lunatics; to persons impressed; to aliens sent out of the realm; to persons voluntarily enlisting in the army or navy; and to other causes not connected with imprisonment for crime, in consequence of which the bail were unable to surrender their principals.

The cases, upon which the counsel for the plaintiff appears

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to have more fully relied, are those of *Fowler v. Dunn*, 4 Bur 2034; *Phœnix Fire Ins. Co. v. Mowatt*, 6 Cow. 599, and *Parker v. Chandler*, 8 Mass. 264. In that of *Fowler v. Dunn*, a *habeas corpus* was moved for, on behalf of the bail, to bring in the defendant, who was convicted of felony, and was on ship-board, about to be transported. The motion was refused by the court, on the ground of inconvenience, as the vessel was ready to sail and much delay might be occasioned by it. And the court added, that the bail might as well move for the *habeas corpus* after actual transportation, as the king's writ runs into the colonies.

In regard to this case, it may be said to rest on its own peculiar circumstances; the court not questioning their power to issue the writ, nor that the party moving for it could have had the benefit of it, if the vessel had not been about sailing. This is apparent from the case of the *Bail of Peter Vergen*, 2 Stra. 1217. See also *Folkein v. Critico*, 13 East, 457.

The case of the *Phœnix Fire Ins. Co. v. Mowatt* was this: The defendant was sentenced to the penitentiary for two years, and the court refused to enter an exoneretur on the bail piece, on the ground of its being a temporary imprisonment. But the court add, that time may be given for a surrender, if the bail are pressed with a suit. In this case, no process was pending against the bail, and the court refused to relieve in a summary manner; but it is obvious from their concluding remark as to time, that they did not consider the bail remediless. And as to giving time, see *The People v. New York Common Pleas*, 2 Wend. 263.

A case was also cited from 5 Call, 296, *Ross v. Randolph*, in which a plea by the special bail, that the principal was confined in jail for debt, in Philadelphia, was held unavailing; the court considering that the bail took the risk upon themselves arising from acts of the principal of a civil nature; but if he had been confined for the punishment of a crime, the court held that the bail would have been entitled to relief.

But the case on which the plaintiff mainly relies is that of *Parker v. Chandler*, 8 Mass. 264. It was an action of *scire*

Way v. Wright & another.

fecias against the bail of one Sprague ; and it was agreed that he was chargeable, unless he was excused from surrendering his principal, in consequence of his being a convict in the state prison. The court observed, "that nothing but the act of God can excuse in the case of bail," and the defendant suffered judgment to go against him by default. It would seem from the report, that this case was not much considered. The position, that only the act of God can excuse in the case of bail, is hardly tenable, unless all acts are referred to him mediately. Bail are excused from surrendering the principal, by the act of the law, as where the debt is discharged by a certificate of bankruptcy. And so by the act of the government ; as where an alien, who has been held to bail, is sent out of the realm, or a seaman is impressed into the government service. Bac. Ab. Bail in Civil Causes, D. 1 Tidd's Pract. (1st Amer. ed.) 243.

But the decision, in the case of *Parker v. Chandler*, is not in accordance with decisions in England, nor with those in the State of New York ; and its authority has been much shaken, if not entirely overruled, by the case of *Bigelow v. Johnson*, 16 Mass. 218. This was also *scire facias* against bail ; and to a plea in bar, the plaintiff replied that the principal was a convict in the state prison, and so the body could not be taken in satisfaction of the execution. And in support of the replication the counsel relied on the case of *Parker v. Chandler*. The court adjudged the replication bad on demurrer, and Parker, C. J. in giving the opinion of court, and commenting upon the case cited, says, "it is one thing to excuse bail, and another to discharge them upon surrender of the principal. Notwithstanding that decision, we apprehend that bail might have a *habear corpus* for the principal in the state prison, and surrender him."

On the part of the defendants, it is contended, that the principal has been taken from their custody and placed beyond their control, by the act of the law, in the execution of a criminal sentence, and this without their participation or fault ; and that a surrender of the debtor's body would be without any possible benefit to the creditor, and but an idle ceremony, as the prisoner would be immediately remanded ; that under such circum-

stances, they are not chargeable with the debt, but are entitled to be relieved on motion ; as the act of the law, which they could not control, is equivalent in this respect to the act of God.

In support of this position, the defendants' counsel has cited various authorities from English and American books. The case of *Peter Vergen's Bail*, already cited, is a leading authority on the subject. There, the convict, having a civil action depending against him, was brought up by *habeas corpus*, and surrendered in discharge of his bail. In *Wood v. Mitchell*, 6 T. R. 247, the principal was convicted of felony and sentenced to transportation ; and on motion of the counsel for the bail, an exoneretur was entered on the bail piece, without subjecting the party to the expense of a *habeas corpus*.

In the case of *Sharp v. Sheriff*, 7 T. R. 226, the defendant was arrested at the suit of the plaintiff, and bail was put in. Afterwards he was committed to prison on a charge of murder ; and on motion of the counsel for the bail, a *habeas corpus* was granted to bring the prisoner in to be surrendered in discharge of his bail. In *Biggnell v. Forrest*, 2 Johns. 482, the defendant was in prison on a charge of forgery, and was brought up on *habeas corpus* by his bail. After his surrender to the sheriff, the court ordered an exoneretur to be entered on the bail piece. In *Cathcart v. Cannon*, 1 Johns. Cas. 28, the principal having been convicted and sentenced to the state prison for life, the court, on motion of the counsel for the bail, ordered an exoneretur to be entered. In *Loflin v. Fowler*, 18 Johns. 335, the defendant was convicted of a crime in Vermont, and sentenced to the state prison in that State ; and on motion of the counsel for the bail, an exoneretur was entered on the bail piece. See also 2 Wend. 263. *Dixon v. Vanezara*, 1 McCord, 373, and *Bigelow v. Johnson*, 16 Mass. 218.

It was argued by the plaintiff's counsel, that if the defendants were entitled to relief in this case, it could only be by obtaining a writ of *habeas corpus*, and surrendering the prisoner in court, in discharge of their liability ; and for this he cited *Bigelow v. Johnson*, in which the court say, that the bail might have

a *habeas corpus* for the principal in the state prison, and surrender him. We have no doubt such a course is perfectly proper ; but we do not think it was intended, by that decision, to hold that it was the only course by which the bail, in such a predicament, could be released from their obligation. The question then before the court arose upon the pleadings, and did not require an examination into the different modes by which the bail could be relieved. And we think, upon the weight of authority, as well as upon sound reason, that bail, in a case under circumstances like the present, may be relieved on motion.

From the cases cited it appears that where a party is committed to prison on a charge of felony, a *habeas corpus* will be granted, on motion of the bail, to enable them to surrender their principal ; but that where the party is in prison under sentence as a convict, an *exoneretur* will be entered on the bail piece, upon motion. And the reason for the distinction is this ; that when the party is confined under a charge only of felony, he may be acquitted, and his creditor may derive some benefit from taking him on his execution ; but when he is in prison under sentence, the creditor can derive no advantage from his execution, as the prisoner will be immediately remanded. In such a case, a *habeas corpus* is an unnecessary expense ; and, as in England and in New York, the court in such cases direct an *exoneretur* to be entered on the bail piece ; so under our practice of *scire facias* against the bail, we think a proper and the most expedient course is, to discharge the bail on motion.

The law on this subject we consider to be this ; where by the act of God, or the act of the government, or by sentence of the law, the principal is removed or taken from the custody or control of the bail, before they are fixed, so that they cannot surrender him, to enable the creditor to charge him in execution, and that without any fault on their part, then the bail are entitled to their discharge, as is well expressed by Mr. Dane, in his Abridgment, Vol. V. p. 290.

Under this view of the law, we think the court of common pleas were correct in their discharge of the defendants.

SAMUEL R. PUTNAM vs. THE MERCANTILE MARINE INSURANCE COMPANY.

A commission merchant, to whom the cargo of a vessel is consigned for sale, has an insurable interest in his expected commissions, and may insure the same while the vessel is on her voyage.

THIS was an action of assumpsit on a policy of insurance, made by the defendants, on the 11th of March 1835, by which the plaintiff, "for Alfred Barrow, Putnam & Co., payable to S. R. Putnam, in case of loss," insured "\$ 1500 on commissions on the cargo of the brig Progress, at and from St. Helena to Antwerp." The policy contained this clause: "Company not liable, unless the loss on said cargo amounts to more than 50 per cent., in which case, they are to pay as for a total loss; but in case any accident happens by the perils, which insurers assure under the usual form of policies issued in Boston, preventing said vessel's reaching its port of destination, as above, then, (unless the property is reshipped, and the assured realize 50 per cent. of their commissions on the same,) the company is liable for a total loss." The commissions were valued at the sum insured.

The declaration alleged that Alfred Barrow of Antwerp, and Samuel R. Putnam of Boston, were jointly interested in the commissions aforesaid; that the policy was made to and for the use and account of said firm, and that the plaintiff was their authorized agent to effect said insurance; that the vessel sailed from St. Helena for Antwerp, with a cargo, and was lost, about the 10th of March 1835, by the perils of the sea; and that thus the said commissions were wholly lost.

The facts of the case, which appeared on the trial, were proved by the deposition of Charles Scholfield, supercargo of the Progress; and sundry letters and extracts from letters were also introduced into the case, together with the bills of lading of the cargo; and it was admitted by the defendants, that the plaintiff and said Barrow had established a commission house at Antwerp, where Barrow resided, and that they there carried

on commission business, had warehouses, clerks, &c., held themselves out as ready to receive business, and had frequently sold cargoes for the owners of the cargo of the *Progress*.

The letter of instructions from the owners of the *Progress* to the master, Joseph Easterbrook, and the supercargo, Charles Scholfield, were dated January 4th 1834. The instructions were given to them, as joint supercargoes, to proceed from Boston to Sumatra, for a cargo of pepper, and, if they could fill the vessel, then to proceed to Gibraltar: and in case they should there meet no instructions from the owners, to proceed to such ports in the Mediterranean as should promise the best market for their cargo, sell it, and settle the voyage in conformity to the freight agreement, and remit as they should be directed: That if they should fail to get a full cargo of pepper, they should go to Manilla, where they were authorized to sell any pepper they might have, and procure sugar, and some hemp and coffee; but if they should have a part of their cargo of pepper undisposed of, they would not need hemp, and should proceed to Antwerp with their pepper, coffee and sugar: But if sugar should be higher than their limits, then they should ballast only with sugar, and proceed to Boston: That if they should get as much as two thirds of a cargo of pepper on the coast, and could not fill up there, they were authorized to go to Padang, and lay out the residue of their funds in coffee; in which case, they were to proceed to Antwerp: That if they should go to Padang, as they would not have funds to fill the vessel, they were authorized to take freight, if to be had; and, in such case, to go to any port in Holland, if required, as they might think best, and finish their cargo there: That if they should load with pepper on the coast, and return to Europe, so that they should find that they could probably reach Antwerp by the middle of November, they should go to Antwerp instead of Gibraltar; otherwise, to Gibraltar. For their services, as joint supercargoes, they were to receive 3 per cent. of the return cargo, or the net proceeds of the same.

It was in evidence, that the master and supercargo sailed under these instructions, procured about a quarter of a cargo of pepper

at Sumatra, proceeded to Manilla, and there completed their lading : That they wrote to their owners, from Manilla, under date of October 21st 1834, and sent the invoice and bills of lading of the cargo on board the *Progress* ; adding that they had on board as much as she would safely carry, and that they should proceed, without delay, to Antwerp : That they accordingly sailed for Antwerp in November, and stopped, on their way, at St. Helena, where they wrote to their owners.

The aforesaid bills of lading stated that the cargo was shipped for account of the owners, (naming them,) and bound for Antwerp, to be delivered unto Messrs. Charles Scholfield and Joseph Easterbrook, or to their assigns paying freight, as per agreement.

The *Progress* proceeded from St. Helena for Antwerp, and in March 1835 ran upon a bank off Flushing, where she lay two nights and nearly two days. A part of her cargo was discharged into lighter boats, while she lay on the bank, and some sugar was thrown overboard. After she was got off, the rest of the cargo was unladed, and the whole was stored at Flushing, and the brig was condemned as unseaworthy. As soon as the cargo was taken from the brig, said Scholfield went to Antwerp, and saw Mr. Barrow, who showed him a letter from the owners, authorizing him (Barrow) to order the brig either to Antwerp or to Rotterdam, as he should think best. And Scholfield deposed, that he had no management of the brig, after arriving at Flushing, because those orders superseded his instructions : That Barrow, after some conversation with Scholfield, thought it best that the cargo should be sent to Rotterdam, as they (Scholfield and the master) would have much trouble in getting it to Antwerp, on account of the non-intercourse between Holland and Belgium ; and great expense would be necessary to ship it in Dutch lighters to the line, and then have it transhipped into Belgium lighters ; and that this proceeding would have injured the Manilla bags, which were very frail.

The cargo was shipped to Rotterdam, and sold at auction for the benefit of the underwriters.

In answer to interrogatories, Scholfield deposed, that but for

the accident, he should have gone directly to Antwerp, having a Manilla cargo ; that Barrow ordered him to send the cargo to Rotterdam ; that he did so, and consigned it to the house of Wilkins, Blockhuysen & Co. under directions from Barrow, in consequence of instructions from the owners of the cargo : That there was very little difference between the markets of Rotterdam and Antwerp, for the sale of the cargo ; although he (Scholfield) considered Antwerp rather the best, and should have sent it there, if it could have been done without extra trouble or expense : That he and the master were ordered — by a letter written to them by the owners, and received after his (Scholfield's) arrival at Antwerp, and after Barrow had shown to him the other letter, as above stated — to place the cargo in the hands of Barrow, Putnam & Co. : That the brig was bound from Manilla to Antwerp, but they expected to receive instructions from their owners, at Flushing, but should not have waited for them.

On the 14th of March 1835, Barrow, Putnam & Co. wrote from Antwerp to the master and supercargo of the *Progress*, stating that they had just heard that the brig was stranded, but that the cargo would be saved, and added, “ we have authority to send the vessel to Holland, if it should appear most for the interest of the parties concerned. We do not know how your cargo is composed, but we suppose chiefly of sugar, which will answer well here. If the brig cannot be got off, we think you would do well to send up the cargo in lighters.” On the 17th of the same month, they wrote again, saying, “ if the brig cannot come up, the cargo must be sent in lighters to the frontiers, and we will then send Belgian lighters to bring the merchandize up here. Until we hear from you, we cannot take any steps.” On the 19th of the same month, Scholfield being then in Antwerp, Barrow, Putnam & Co. addressed to him a letter, saying, “ we give you annexed an extract from letters we have received from owners of the *Progress's* cargo. Under the unfortunate circumstances in which the vessel and cargo are placed, we recommend to you to address yourself to Messrs. Wilkins, Blockhuysen & Co. of Rotterdam, for the sale of the cargo, and

the general management of your business. We address these gentlemen direct, and desiring them to write to you at Flushing, advising the best steps to be taken. We suppose they will recommend that no part of the cargo be sold at Flushing." The extract, which was annexed to this letter, was thus : " Should the Progress arrive with you, she will discharge her cargo at Antwerp, unless more advantageous to go to Holland ; in which case, we depend on your advising the agents." This extract was without date, but it appeared from Scholfield's deposition, that it was January 18th 1835 : And Scholfield also deposed, that a day or two afterwards, and before he went to Rotterdam, a letter from the owners of the cargo, dated July 29th 1834, (nearly seven months after the brig sailed from Boston,) was put into his hands, directed to him and the master, and containing these directions : " In the event of your going to Antwerp with your cargo, you will consign our property to Messrs. Barrow, Putnam & Co. and have it sold, and the voyage settled according to freight agreement." This letter was addressed to them at Antwerp, care of Messrs. A. Barrow, Putnam & Co.

Scholfield further deposed, that if the master and he had received no letters at Antwerp, they should have chosen the consignees : That the cargo was sold at Rotterdam for a large profit on the original cost ; but that the loss, by reason of the property thrown overboard and the sea damage, was about ten per cent : That the cost of carrying the cargo to Antwerp, in two sets of lighters, would have been double the cost of carrying it to Rotterdam, which was done by one set.

The defendants insisted that, on this evidence, no such loss was shown to have happened, as would entitle the plaintiff to recover, even if he had any interest in the subject of the insurance ; and that if the loss had happened, yet the plaintiff and his partner, Barrow, had no insurable interest covered by the policy.

By consent, a verdict was taken for the plaintiff, subject to the opinion of the whole court, who were desired to draw such inferences from the facts stated, as a jury would be warranted in drawing.

The argument was had at the last March term.

C. G. Loring & Crowninshield, for the plaintiff.

W. D. Sohier, for the defendants.

HUBBARD, J. Two questions are presented for the consideration of the court in this case : The one, whether the plaintiff had an insurable interest in the subject matter of the insurance ; and the other, if the plaintiff had such insurable interest, whether a loss has happened for which the defendants are answerable under their contract.

In the progress of the law of insurance, many cases have arisen for legal investigation, which exhibit the varieties of interest that grow out of the complicated business of commercial communities. Originally, the owners of the vessel and cargo, and the designated voyage, were alone the subjects of the contract ; but, as commerce has been extended, the rights of persons, other than those of the specific owners of the property, have become involved in the results of the voyages. In consequence of it, the law of insurance has been most reasonably extended to embrace within its provisions cases, where the parties, having no ownership of the property, have a lien upon it, or such an interest connected with its safety and its situation, as will cause them to sustain a direct loss from its destruction, or from its not reaching its proper place of destination. Such rights have received protection, and the expectation of profits, the loan upon mortgage or respondentia, the advances of a consignee, an agent or factor, and the commissions of a master or supercargo, are all now the well recognized subjects of insurance.

The contract before us is that of an insurance on the expected commissions of a merchant upon goods on shipboard, in the progress of the voyage, and which are consigned to him for sale ; but upon which he has made no advances, nor accepted bills on the faith of the consignment. This presents a case which has not yet been decided, and the question is, whether it is embraced within the principles, by which contracts for the insuring of profits, and of expected freight, and commissions of supercargoes and masters, have been held valid : or whether it

is to be classed with wager policies, on the ground that it is a case of mere expectation, not coupled with an interest.

The facts spread before us are these : The plaintiff is a partner in a mercantile house in Antwerp, which receives the goods of foreign merchants to sell on commission. The owners of the brig *Progress* had despatched her to India for a cargo, to be carried to and sold in Europe ; and if a certain cargo was procured, it was to be carried to Antwerp. Such a cargo was obtained, and the vessel sailed for that port. While at Manilla, the supercargo wrote to his owners. On receiving the letters, they wrote, it would appear, (so far as we can gather from the correspondence, the whole not being produced on the trial) to the house in Antwerp, consigning the cargo to them. They also wrote to the master and supercargo, informing them of the consignment, and directing them to their consignees for instructions. They also gave discretionary orders to the consignees to send the vessel to Holland, if the market there was preferable to that at Antwerp. With the knowledge of these facts, and that the vessel had been heard from at St. Helena, Putnam, the partner in Boston, procured insurance on the commissions the house would receive if the vessel should arrive, as on a voyage from St. Helena to Antwerp.

There is, then, a direct consignment of the cargo to the plaintiff's house ; the commissions will be earned if the vessel arrives and the cargo is sold there ; and if she is lost on her way, or the voyage to Antwerp is defeated by one of the perils insured against, the plaintiff will sustain a certain loss.

The case, in its essential features, is like that of an insurance on profits, depending on the arrival of the vessel at a particular port, and founded on like expectation. It partakes not of the nature of wager ; for, in the event of the wager, independent of the policy, the party insured has nothing to lose. Here, if there were no insurance, the party would lose his commissions, if there should be a loss of the cargo.

The subject of an interest like the present is treated of in the celebrated case of *Lucena v. Craufurd*, 2 New Rep. 292. In the opinion, in which seven of the judges concurred, it was

said, that "a vested interest is not necessary to give the right of insuring. The commissioners had a contingent interest; and supposing the intentions of the crown to remain unaltered, nothing stood between them and the vesting of that contingent interest, but the perils insured against. It is stated, that they cannot be entitled to an indemnity; for they had nothing to lose. But in fact they lost, by the perils of the sea, what but for those perils would have vested in them absolutely. At the time both of the insurance and the loss, their title, like that of a consignee, was inchoate; occupancy was necessary to perfect it. It is true, that their interest is revocable. But so is that of a consignee. The owner may at any time appoint another consignee or agent; he may change his intention in the course of the voyage. It is very common to direct the captain to touch at particular ports for new instructions. The powers of a consignee, therefore, are not more permanent than those of the commissioners." And in page 301, Mr. Justice Lawrence observed, that "insurance is a contract, by which the one party, in consideration of a price paid to him adequate to the risk, becomes security to the other, that he shall not suffer loss, damage or prejudice, by the happening of the perils specified, to certain things which may be exposed to them. If this be the general nature of the contract of insurance, it follows that it is applicable to protect men against uncertain events which may in any wise be of disadvantage to them; not only those persons to whom positive loss may arise by such events occasioning the deprivation of that which they may possess, but those, also, who in consequence of such events may have intercepted from them the advantage or profit which, but for such events, they would acquire according to the ordinary and probable course of things."

This reasoning is sound and sagacious. It introduces no novel principles into the law; it advances no position hazardous to regular trade, though its tendency is to enlarge the legitimate subjects of insurance. We cannot but be struck with the pointed bearing, which the foregoing remarks have on the case at bar, and we feel justified in making a practical application of them

See also the cases of *Flint v. Le Mesurier*, Park on Ins. 403. *Barclay v. Cousins*, 2 East, 544. *Law v. Goddard*, 12 Mass 112. *De Forest v. Fulton Fire Ins. Co.* 1 Hall, 84.

There is also a case in our own books, where the right of the consignee to effect insurance on his commissions is mentioned without expressing any doubt in regard to it. *French v. Hope Ins. Co.* 16 Pick. 397. This was an insurance on profits on merchandize. It was held that the plaintiff had a substantial interest at risk, for, if the ship had arrived safely, he would have been entitled to profits ; and they depended on her safe arrival. The learned judge, who delivered this opinion, says, "the objection principally relied upon is, that the plaintiff was not the owner of the merchandize ; that he could not have insured the goods, and *a fortiori* not the profits on the goods which did not belong to him. The rule, if received to the extent laid down, would prevent the insurance of commissions on goods consigned to the plaintiff. If, in the case of a consignee, the goods should arrive safely, he would be entitled to commissions on the sale. So in the case at bar, if the goods had arrived, the plaintiff would have realized a profit. The cases seem to us to be perfectly analogous. In each, the party claiming profits or commissions has either to run the risk and bear the loss himself, or to get insurance against marine risk. In each case he has a real interest to protect."

The case at bar, indeed, stands on the very borders of the line — which may be deemed almost shadowy — where interest ends and expectation begins ; but the line, however thin, must be drawn somewhere, or the difference between wager policies and those coupled with an interest must cease. And upon consideration we are of opinion, that the regular consignee of goods has an interest in his expected commissions, equivalent to that of expected profits, and that such commissions are the lawful subject of insurance.

The second question for our examination is, whether a loss has happened, for which the defendants are answerable under their contract.

The parties differ in their views of the evidence, and they

desire the court to draw such inferences as a jury would be warranted in making. The fact in difference, and upon which this part of the case turns, is, whether the cargo of the *Progress* was sent to Rotterdam in consequence of intelligence, alleged by the defendants to have been received from the owners, subsequent to March 14th, when Barrow wrote his letter to the supercargo ; or because Rotterdam furnished the best market for the sale of the cargo ; or whether, as the plaintiff alleges, it was solely owing to the wreck of the vessel, the importance of saving the expense of double lighterage, and the better to protect from damage the part of the lading consisting of Manilla sugar, that the cargo was forwarded to Rotterdam instead of Antwerp.

The defendants infer that letters subsequent to March 14th were received by Barrow, because his first orders were, to have the cargo forwarded to Antwerp ; and in five days after, he directed it to be sent to Rotterdam. But this change of orders might well have taken place, as the difficulty of getting the cargo to Antwerp became more apparent to him, without supposing that new orders had been received from the owners. As the whole correspondence of the owners and the house in Antwerp has not been put into the case by either party, we cannot say that there were any letters received by the house, between the 14th and the 19th of March, when the positive orders were given by Barrow to forward the cargo to Rotterdam. On the other hand, the letter from Barrow to the supercargo, of March 14th, contains this clause : " We have authority to send the vessel to Holland, if it should appear most for the interest of the parties concerned ; " and on the 19th, at Antwerp, Barrow gave him an extract from the letter of the owners, which has this passage : " Should the *Progress* arrive with you, she will discharge her cargo at Antwerp, unless more advantageous to go to Holland : " From which we are led to infer, that the passage in the letter of the 14th is derived from the letter of the owners from which the extract is given on the 19th, and that no further advices had been received from the owners.

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The facts, in regard to the forwarding of the cargo to Rotterdam instead of Antwerp, rest upon the testimony of Scholfield, the supercargo ; from which it appears that Barrow ordered the cargo to be sent in lighters to Rotterdam, because of the greater difficulty or increased expense and risk of getting it to Antwerp ; and that the prices were about the same, though the market at Antwerp was rather the best. We therefore come to the conclusion, that it was owing solely to the perils of the sea, by which the vessel was totally lost, that the cargo did not reach Antwerp, its port of destination.

The terms of the contract are special. In it the parties agree, "in case any accident happens by the perils which insurers assure, under the usual form of policies issued in Boston, preventing said vessel's reaching its port of destination as above, then (unless the property is reshipped, and the assured realize 50 per cent. of their commissions on the same) the company is liable for a total loss." It appears from the facts as proved, that Antwerp was the port of the vessel's destination ; that she was prevented from reaching it by the perils of the seas, which risks are assumed in policies issued in Boston ; that in consequence of these perils, the cargo was not reshipped, and the assured lost their commissions. The plaintiff's case is therefore sustained, and the defendants are responsible on their contract.

Judgment on the verdict.

ROBERT T. PAINE vs. MARY A. P. PRENTISS.

A testatrix devised real estate to A., her nephew, in trust for P., her niece, and to her heirs and assigns forever, the income thereof to be paid to P. during her life : P. died before the testatrix, leaving issue, an infant daughter, who survived the testatrix. *Held*, that the trust was created for the benefit of P. only, and that A. therefore took no estate under the will, but that P.'s infant daughter took the devised estate in fee, by virtue of the will and of the Rev. Sts. c. 62, § 24.

THE plaintiff, in a bill in equity, alleged that Mary Clap, late of Boston, deceased, by her last will, executed August 10th 1832, and proved and allowed April 4th 1842, devised

to the plaintiff an undivided portion of certain real and personal estate, "in trust for his sister, Elizabeth Prentiss," [niece of said Mary, the testatrix,] "and to her heirs and assigns forever; the interest to be paid to her or her order, during life, for her sole and separate use:" That said Elizabeth died while the testatrix was alive, leaving the defendant, Mary Ann P. Prentiss, her only child, then and still a minor: That the plaintiff had assumed the aforesaid trust, under said will, believing himself entitled, under the Rev. Sts. c. 62, to take the estate so devised, and to hold the same, in like manner as if said Elizabeth had survived the testatrix; and that he had endeavored to perform the trust, for the benefit of said Mary Ann P.: That the situation and condition of the real estate devised to him, as aforesaid, were such, that little or no income could be obtained therefrom; and that a sale of the same, and an investment of the proceeds in some safe and productive manner, were required for the benefit of said minor: That the other parties, interested in said real estate, concurred with the plaintiff in opinion, and were about uniting in a sale of all their respective shares therein, as the best disposition that could be made thereof.

The plaintiff therefore prayed that his power and duties under said will might be declared by the court, and that he might be authorized, and by a decree directed, to join in a sale of the share of the real estate, so as aforesaid devised to him in trust; or that such other decree might be passed, as should be fitted to the nature of the case. He also prayed that a subpœna might issue to the said Mary Ann P., commanding her to appear and answer.

The answer of the defendant (made by her guardian appointed by the court for this case) confessed the facts stated in the bill, and submitted her rights and interests to the protection of the court; averring that "whether the plaintiff had any greater legal estate devised to him, than for the life of her mother, or whether he is now a trustee thereof under said will, she knows not, but claims to be entitled absolutely, in her own right, to the share and portion devised for the life of her said mother."

Written arguments were submitted to the court, in June 1842.

Aylwin, for the plaintiff.

Paine, for the defendant.

HUBBARD, J.* This case comes before us on bill and answer, and the question presented to us is, what estate, if any, the defendant, who is a minor, has in the property devised. The complainant claims to be the devisee of the legal estate, by force of the will, and to hold the same for the benefit of the defendant, as a continuing trust. But he also contends, that whether continuing or not, as the legal estate is in him, he should be directed to convey, upon proper proceedings, in such manner as the estate may have vested; and that it should be held by him till the defendant arrives at full age and assents to the devise.

The intent of the testatrix was, to give the property to her niece, and her heirs and assigns, and thus to make an absolute gift of the estate devised, both real and personal; but for the purpose of securing to her niece the income during life — she being a married woman — the testatrix devised the same in trust to the plaintiff.

Before the *St.* of 1783, c. 24, § 8, which is continued in force by the Rev. Sts. c. 62, § 24, the devise would have lapsed, and the creation of the trust for the purpose of securing the income to the devisee, during her life, would not have saved it. *Colson v. Colson*, 2 Atk. 246. *Hodgson v. Ambrose*, 1 Doug. 336.

The language of the statute, as revised, is, “when a devise of real or personal estate is made to any child or other relation of the testator, and the devisee shall die before the testator, leaving issue who survive the testator, such issue shall take the estate so devised, in the same manner as the devisee would have done, if he had survived the testator; unless a different disposition thereof shall be made or required by the will.”

It was suggested in the argument, that *St.* 1783, c. 24, § 8,

* *Wilds*, J. did not sit in this case.

related to legal estates, if a literal interpretation were had ; but that equitable devises were equally within the mischief intended to be remedied by that clause of the statute. And we are of opinion that the statute is to receive a liberal construction, and that by the term devise, as there used, is meant, any devise, bequest, or gift, which the testator intended should go to the use and benefit of the child or other relation named ; as well those legacies which are given to a trustee for the benefit of the relation, as those which are given directly to the party.

In this case, the mother dying before the testatrix, what is the nature of the estate to which the daughter is entitled ? If we should adhere to the mere words of the statute, it might be said that the plaintiff should hold the estate for the daughter, in trust, and pay to her the income, that being "in the same manner" the mother was to enjoy the benefit of it. But we are to look at the intention of the testatrix, and when that is ascertained, we are then to consider what is the bearing of the statute on the devise. And we are of opinion, that the object she had in view, in creating the trust, was confined to the life of Mrs. Prentiss ; and, as she died during the life of the testatrix, the trust estate never took effect in the plaintiff ; a continuance of it not being required to give force to the devise. The defendant's title then flows directly from the testatrix, by force of the statute, which preserves the legacy, and substitutes the child as the devisee in place of the parent, and discharged of the trust ; because in regard to her, as heir of her mother, a different disposition of the estate is made by the will ; the devise being to the mother, in trust, but to the heirs, in fee ; which word heirs is here a *designatio personarum*.

Though the defendant is a minor, yet as the devise is for her benefit, her assent is to be presumed. We are therefore of opinion, that the defendant is seized in fee of the undivided part of the real estate, and is entitled to her share of the personal estate, according to the terms of the devise.

The bill must therefore be dismissed, and the guardian or next friend of the defendant may apply for leave to sell her share of the real estate, under the usual provisions of the statute on the subject.

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JOHN S. WRIGHT vs. ALEXANDER OAKLEY & another.

By the Rev. Sta. r. 90, when a suit is brought against a defendant who has been an inhabitant of the State, but resides out of the State, and is not within its jurisdiction when the writ is served, and no effectual attachment of his property is made, it is necessary, in order to constitute a sufficient service of the writ, that the summons be left at his last and usual place of abode within the State. But it seems that if the summons for such defendant is left with his agent or co-defendant, the court may order a new summons or notice to be issued and served, and that after a return of the service of personal notice on him, he is bound to answer to the suit.

The provision in the Rev. Sta. c. 120, § 9, that the time of a party's absence and residence out of the State shall not be taken as any part of the time limited for the commencement of an action against him, does not apply to a case in which the action was barred by the statute of limitations that was in force before the revised statutes went into operation.

THIS action was commenced against William, Alexander and George Oakley, formerly partners in business at Boston, as the drawers of two bills of exchange upon a firm at New York, who accepted, but failed to pay them at maturity. One of the bills became payable in May, and the other in September, 1826, and were purchased by the plaintiff, after they were dishonored.

The writ was dated August 19th 1839, and the officer's return thereon was as is hereinafter stated in the opinion of the court. The action was entered at the succeeding October term of the court of common pleas. An appearance was then entered for Alexander only, and the action was brought into this court by demurrer. At the March term, 1841, notice of the pendency of the action was given to George, by serving on him a copy of a rule of the court, obtained on motion of the plaintiff's attorneys. William Oakley died in England, a few days before the date of the writ.

The trial was had at the last March term. Before the case was opened to the jury, a motion was filed in behalf of George Oakley, that the action should be dismissed, as to him, for want of sufficient service; no appearance having been made for him. It was ruled, by consent, that said George should plead to the action, without prejudice; and the question as to the sufficiency

of the service upon him, was reserved for the consideration of the whole court.

The drawing of the bills by the defendants' firm, the presentment to the acceptors for payment, the protest for non-payment, and notice to the defendants, were proved or admitted. The defendants relied on the statute of limitations.

It was in evidence, that the defendants failed about the time of the maturity of the first bill, and that after both causes of action, on which the plaintiff relied, had accrued, they removed from Boston to New York. There was also evidence, (which it is unnecessary here to state,) as to the subsequent residence of the defendants in this Commonwealth.

The jury were instructed, that although, under the old statute of limitations (*St. 1786, c. 52*), the action was barred on one of these bills in May, and on the other in September, 1832, yet the *Rev. Sts. c. 120, § 9*, altered the law in this particular, and enabled the plaintiff to sue and maintain his action, unless the defendants could show a residence of six years, in the whole, in this Commonwealth, since the causes of action accrued, and before action brought: That residence, in this case, meant the same as domicile; and that in making up the six years, mere temporary and occasional absences out of the State—the domicile remaining—were not to be included in the computation.

The verdict was against both defendants for the amount of both bills.

Verdict to be set aside, or amended, as to both or either of the defendants, or such other disposition to be made of the action, as, in the opinion of the whole court, the law of the case requires.

This case was argued at the last March term.

Gardiner & English, for the defendants.

B. Rand, for the plaintiff.

SHAW, C. J. The first question in the present case is, whether there has been such a service of process on George Oakley as to warrant the court in taking jurisdiction of the cause as to him. The facts are, that the said George Oakley was not, at the time of the service of the writ, an inhabitant of the

Commonwealth, or within its jurisdiction ; and the only service made on him was by a mere nominal attachment. The return of the officer in substance is, that by direction of the attorneys, he attached a chip as the property of the three defendants, and summoned them by giving a summons to Alexander, and at the same time by giving him a summons for William, and another for George. William, who was the father of the other two, had then deceased, and no question arises as to him.

The general rule certainly is, that to render a party liable to the jurisdiction of a court of the State, so that a valid judgment may be rendered against him, he must be either, 1st, an inhabitant, and have his domicile within the State ; or 2d, he must be personally within its jurisdiction ; or 3d, he must have property within the jurisdiction, liable to be reached, and bound to answer such judgment, by some legal process.

But this is to be taken with some limitations. By the Rev. Sts. c. 90, § 44, it is provided, that "no personal action shall be maintained against any person who is out of the State at the time of the service of the summons, unless he shall have been, before that time, an inhabitant of the State, or unless an effectual attachment is made," &c. This certainly carries a strong implication, that such an action can be maintained, if the defendant has heretofore been an inhabitant, though not one at the time. The reasons of this provision are stated by the commissioners for revising the statutes, in their note to the corresponding section of their report. Note to c. 90, § 39. It is there stated, that such a course of proceeding is warranted by ancient usage ; that it may be useful and beneficial for some purposes, as in case the defendant should return within the jurisdiction ; and, under the restrictions with which these proceedings are to be had, and a judgment taken against an absent defendant, will work no injustice. At the same time, it is admitted that such a judgment would have very little force in any foreign jurisdiction. It seems therefore to have been the intent of the legislature, Rev. Sts. c. 90, § 44, that an action may be maintained against a person out of the State at the time, if he had before that time been an inhabitant of the State, or if

an effectual attachment shall have been made on the original writ. But it is provided by § 45, that if the defendant is out of the State at the time of the service, the summons shall be left at his last and usual place of abode, if there be any within the State. If the defendant has ever been an inhabitant, he must have had a domicil and a place of abode within the State; and it is only in the other alternative, when there has been an effectual attachment of property, and where the defendant was never an inhabitant of the State, that the summons may be left with a tenant, agent or attorney. It is immaterial, therefore, to consider whether Alexander Oakley, as a partner or otherwise, was the agent of George Oakley, within the meaning of this statute. If the latter was amenable to the laws, it was not in consequence of there having been an effectual attachment of property on the original writ, for it is plain there was none; but in consequence of his having been formerly an inhabitant; and therefore he could only be lawfully served with process, by leaving the summons at his last and usual place of abode; which was not done.

But perhaps this failure to make due service originally is not fatal, and the defect may have been repaired by the subsequent proceedings. By the Rev. Sts. c. 90, § 53, it is enacted, that "when the service of the writ, in any civil action, is defective or insufficient, by reason of any mistake on the part of the plaintiff or of the officer, as to the place where, or the person with whom, the summons or copy of the summons ought to have been left, the court may, in their discretion, order a new summons or notice to be issued and served, in such manner as they shall direct; and the service so made and returned shall be as effectual as if duly made and returned on the original writ." In the present case, it appears that after the action was entered in this court, an order was made in the cause, reciting the facts, and directing notice to be given personally to George Oakley, by a service on him of a copy of the order; and it appears by the return of an officer of this county, that a copy of the order was personally served on George Oakley.

At first we were inclined to the opinion, that as George Oak-

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ley was not an inhabitant of the State at the time of the commencement of the action, and as no effectual attachment of property was made, he was not liable to be summoned originally ; and if so, that the subsequent personal notice was inoperative. But upon consideration, and a more careful examination of the statutes, we are strongly inclined to the opinion, that by a proper process George Oakley was amenable to the laws of the Commonwealth, as having been formerly an inhabitant thereof ; that this being the case, the irregularity in the service, in leaving the summons with an agent or attorney, instead of leaving it at the defendant's last and usual place of abode, was a mere mistake in the mode pointed out by the statute, capable of being corrected ; that it was so corrected, and that the defendant, George Oakley, was bound to answer to the suit. It is unnecessary, however, to give a decisive opinion upon this point, for reasons which will hereafter appear.

But the question which, on account of its importance, has seemed entitled to the greatest consideration, is, whether, under the operation of the revised statutes, the plaintiff has now a remedy to recover a debt, which was effectually barred by the former statute of limitations, before the revised statutes went into operation. I state the question in this form, because it appears by the facts, and is not contested, that the two drafts, on which the action is brought, respectively fell due in May and September 1826 ; that the two defendants, George Oakley and Alexander Oakley, resided in Boston at that time, so that the statute of limitations began to run at the time the causes of action accrued ; and consequently, by force of *St. 1786, c. 52*, and the construction uniformly put upon it, the action became barred, on the drafts respectively, in May and September 1832. And under that statute, this result was not changed or affected by the fact, that after the cause of action had accrued, and after the statute of limitations had begun to run, one or both of the defendants went out of the State, and remained out of the State a longer or shorter time, thereby changing residence or domicil, or otherwise. But this action was brought in August 1839, long after the revised statutes went into operation. By

Rev. Sts. c. 120, § 9, it is provided, that, "if, at the time when the cause of action shall accrue against any person, he shall be out of the State, the action may be commenced, within the time limited therefor, after such person shall come into the State; and if after any cause of action shall have accrued, the person against whom it has accrued shall be absent from and *reside out of* the State, the time of his absence shall not be taken as any part of the time limited for the commencement of the action." From a comparison of this provision with the prior statute, it is manifest, that although the time of limitation of actions on bills of exchange is the same in both, the mode of computing that term of time is different; the revised statutes exclude from the computation the time during which the defendant was *absent from* and *resided out of* the State; whilst the old statute made no such exception. The specific question, therefore, is, whether an action, brought after the revised statutes went into operation, can be maintained upon a contract on which an action would have been barred by the old statute, if such action had been brought at any time after 1832, and before the revised statutes took effect.

This is not the question, whether a simple and unqualified repeal of a statute of limitations would revive a cause of action. That would be much more like the case of *Hewitt v. Wilcox*, 1 Met. 154, cited in the argument. In that case, it was held, that the law, preventing an unlicensed practitioner of medicine from having the benefit of law for the recovery of his fees, did not affect the contract, but subjected the party to a personal disability to bring suit. The law was not changed; a contract was implied by law, from the performance of services on request; but the performance of that contract could not be enforced by legal proceedings. So, if the unlicensed practitioner had taken a promissory note, stating the consideration to be for such medical services by him, or a bond under seal to the like effect, the result must have been the same. The contract was not declared invalid, but the law, whilst it was in force, disabled such practitioner from bringing suit upon it. It followed, as a necessary consequence, that when the disability was removed by

an unqualified repeal of the law, an action on the subsisting contract will be maintained. So in case of an unqualified repeal of the statute of limitations. However unjust it would be to pass such a repealing law, inasmuch as it may be presumed, after a statute of limitations has closed so as to form a complete bar to an action, that parties do not take the same care of their vouchers and proofs, and however improbable it may be, that a wise and just legislature would pass such a law, there would be some ground for holding, as the statute of limitations never annulled or affected the contract, but only took away the remedy by action or other legal process, that when the statute was repealed, the remedy might be pursued as if the statute of limitations had never existed. But reserving our opinion upon such a case, if it should arise, we think the revised statutes, and the repealing act accompanying the same, cannot be construed as a simple and unqualified repeal of the old statute of limitations, but rather as a continuance of the provisions of that statute, with some modifications.

In construing the revised statutes and the connected acts of amendment and repeal, it is necessary to observe great caution, to avoid giving an effect to these acts, which was never contemplated by the legislature. In terms, the whole body of the statute law was repealed; but these repeals went into operation simultaneously with the revised statutes, which were substituted for them, and were intended to replace them, with such modifications as were intended to be made by that revision. There was no moment, in which the repealing act stood in force, without being replaced by the corresponding provisions of the revised statutes. In practical operation and effect, therefore, they are rather to be considered as a continuance and modification of old laws, than as an abrogation of those old, and the reenactment of new ones. In order to construe them correctly, we must take the whole of the revised statutes, together with the act of amendment and the repealing act, and consider them in reference to the known purposes which the legislature had in view in making the revision.

The object, we think it manifest, was, not to any considerable

extent to change the law, but to remove doubts, to reconcile discrepancies and contradictory enactments, to give the sanction of positive law to rules which before stood on the authority of usage, reasonable deduction and judicial decision, and to render all the enactments of the statute law more clear, concise and practical. But we think it was not intended to alter to any considerable extent the rules of law affecting the rights of parties, and wherever there was such a purpose manifested, it was intended that the new rules should operate prospectively, and not affect past transactions. Wherever the change in the law was most considerable — as the rules affecting real property — there was a provision postponing the operation of the new rules to a future day. It is, therefore, we think, more consonant with the manifest intent of the legislature, as well as more consistent with principles of justice, in construing any particular provision of the revised statutes, which varies, in any respect, from the corresponding provision of the old law for which it was substituted, to give it a prospective operation, and not to give such a construction, unless necessary, as to disturb existing relations, or unsettle existing rights, duties and liabilities.

We are then brought to the question, whether the repeal of the statute of limitations of 1786, c. 52, with the simultaneous enactment of the Rev. Sts. c. 120, was intended to remove the bar to an action, which had already become complete and absolute under the former statute, and to authorize an action to be maintained when there had not been the lapse of a term of six years, computed according to the mode prescribed in the latter; and we are of opinion that it was not.

It is to be recollected, that although the revised statutes were adopted in the autumn of 1835, their operation was suspended until the first day of the ensuing May, and that, in the mean time, the act of amendment was passed, and the act specifically repealing the prior acts, in terms, so that all went into operation together, and all of them are to be construed together, to ascertain the intent of the legislature.

The Rev. Sts. c. 146, § 3, provide, in general terms, for the repeal of all acts and parts of acts, therein revised, which

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are repugnant, &c., with the exceptions and limitations therein expressed. Sect. 5 provides, that the repeal of the acts therein mentioned "shall not affect any act done, or any right accruing or accrued, or established, or any suit or proceeding had or commenced in any civil case before the time when such repeal shall take effect ; but the proceedings in every such case shall be conformed, when necessary, to the provisions of the revised statutes."

The first remark which presents itself upon this provision is, that it shows an anxious desire, on the part of the legislature, that the revised statutes should take up the existing rights and relations of parties, as fixed and regulated by law, and that their operation upon all rights and relations should be future and prospective. And yet so far as statutory amendments, in the course of legal proceedings, were supposed to have been effected by those statutes, it was intended that they should have an immediate operation. But the great difficulty is, in discriminating between that which may affect the rights of a party, and that which merely regulates the course of proceeding ; because the establishment of a right may often depend upon that course of proceeding. Suppose, for instance, that an action was pending in April 1836, and came on for trial in May following — the revised statutes having in the mean time taken effect. In many cases, these statutes modify the rules of evidence, by rendering witnesses competent, who were incompetent before, or the reverse. This is a mere regulation of the proceeding, and is subsequent to the time when the revised statutes took effect, and is therefore regulated by them. But by thus changing the mode of proof, by a change of the rules of evidence, the plaintiff may fail of proving his case, or the defendant be deprived of the grounds of his defence. The case of *Bickford v. Boston & Lowell Rail Road*, 21 Pick. 109, was one where the revised statutes authorized a trustee, on *scire facias*, to make a new answer, which he could not do before. It was held, that it was a mere regulation of the proceeding, not affecting an act done or right fixed, and was therefore allowable, although it may be that the recovery of the plaintiff depended upon it. See also

Burnside v. Newton, 1 Met. 426. It is obvious therefore that these two provisions, the one, that the revised statutes shall not affect an act done or right accrued, and the other, that legal proceedings shall be conformed to them when necessary, are to some extent conflicting with each other, and in some instances cannot both be obeyed. It becomes therefore necessary, in such cases, for courts to decide, according to the true intent and purpose of the legislature, which rule shall be applied to the particular case; and this must often depend much more upon a just and discriminating view of the objects of the law, than upon a literal application of its terms. In the case of *Sawyer v. Bancroft*, 21 Pick. 210, which was very well argued by the late Mr. Locke of Lowell — to whose memory, as an able and promising advocate, and a most upright and honorable man, I take pleasure in bearing witness — it was held that the costs of an appeal were regulated by the law as it stood before the revised statutes, although the trial and appeal took place in the court of common pleas after the revised statutes took effect, and although, literally, a trial and appeal are but legal proceedings; because, as the court said, that rule would best carry into effect the intent of the legislature. The case of *Gay v. Richardson*, 18 Pick. 417, is to the like effect. There it was held, that the revised statutes, giving costs to the party prevailing on a writ of error, did not apply to a judgment reversed after they went into operation, on a writ of error brought before.

The difficulty of applying this repealing clause of the revised statutes to the statute of limitations arises from the maxim, that the statute of limitations affects the remedy only, and therefore it is inferred, that it does not affect the right, inasmuch as rights and remedies are often, and in many cases very justly, spoken of as contradistinguished from each other. But this is far from being always a just conclusion. It would be more accurate to say, that the statute of limitations bars the remedy, but does not extinguish the cause of action. But in truth, the statute of limitations, though only barring the remedy, does thereby deeply affect the rights of parties. It is eminently a statute of peace. It is founded on the fact, established by experience,

that after a certain lapse of time, loss of proof may be presumed from the death of witnesses, their dispersion or loss of memory, and the loss of vouchers, so that rights cannot safely and satisfactorily be investigated and adjusted ; and therefore suits shall not be maintained. The justice of the general principle is founded in reason and experience, though for obvious reasons of practical expediency, the precise time of limitation must be fixed by positive law. In many respects, the rights of parties do depend upon the statute. After such a bar is fixed, parties feel justified in forbearing to take and preserve evidence, and to retain proofs and vouchers, as they otherwise would ; and they feel, and act upon the conviction, that such causes of action are at an end. And although it cannot be said in technical strictness, that a man has a vested right to plead the statute of limitations, so that it could not be taken away by an express act of the legislature ; yet here we are inquiring what the legislature intended by the use of language, not repealing or professing to repeal the statute, but modifying and continuing it, with a general saving of all rights accruing or accrued, and not affecting any act done ; and we are of opinion, that the legislature did not intend to take away the right, power or privilege of being protected, for the future, against actions then actually barred by the preëxisting law.

And we think this conclusion is somewhat strengthened by the special repealing act of February 1836, repealing, among others, the old statute of limitations, *St. 1786, c. 52*. *Sect. 3* provides, that the repeal of the acts and parts of acts shall take effect from and after the last day of April then next, but with all the exceptions and limitations in that behalf expressed in the *Rev. Sts. c. 146*. *Sect. 4* provides, that in any case when a limitation or period of time prescribed in any of the said repealed acts, for the acquiring of any right or the barring of any remedy, or for any other purpose, shall have begun to run, and the same or any similar limitation is prescribed in the revised statutes, the time of limitation shall continue to run, and shall have the like effect, as if the whole period had begun and ended under the operation of the revised statutes.

If the statute manifestly intended to give effect to a term of limitation, which had partly run under the old statute, *a fortiori*, we think, it must have been intended to have its full effect upon a term which had commenced and been completed under the old statute.

This decision, we think, will not necessarily extend to the case, where part of the period prescribed had run before the revised statutes took effect, and part afterwards, and where the question is, whether that, which had elapsed before the revised statutes, is to be computed without the exceptions of absence from the Commonwealth, under the old statute, or whether it is to be computed with those exceptions, according to the rule prescribed by the revised statutes. This is a different question, on which we give no opinion. This decision is confined to the case where the bar was perfect when the revised statutes went into operation. And we are not aware that this decision is inconsistent with any adjudged case heretofore determined.

The case of *Battles v. Fobes*, 18 Pick. 532, and 19 Pick. 578, confirms this decision, as far as it goes. In that case, it appears that the action was commenced and the plea pleaded, before the revised statutes took effect; in which respect it differed from the present. It was held, that the bar arising from the statute of limitations, which was good when the action was brought and the plea in bar made, was not taken away by a statute which afterwards came into operation before the trial. That opinion was decisive of that case, and rendered it unnecessary to consider whether, if the action had been brought after the revised statutes took effect, and there was a good bar by the rule of computation under the old statute, it would have been taken away because not barred by the rule of computation in the revised statutes — which is the precise question in the present case. Upon that question, now presented, the court are of opinion, that where an action had been barred by the operation of the statute of limitations, before the revised statutes passed, it was not intended that that bar should be taken away by the qualified repeal of that statute; that that statute is a good bar to the present action; and therefore that the verdict, taken for the plaintiff, must be set aside and a nonsuit entered.

COMMONWEALTH vs. BENJAMIN F. RICKETSON.

By the 32d chapter of the revised statutes, every Boston pilot, who offers his services to the master of an inward bound vessel, before she has passed the line designated in § 24 of that chapter, is entitled to full fees of pilotage, whether his services are accepted or not.

Any master of a vessel may, in all cases, pilot his own vessel into Boston harbor, liable only to the payment of pilotage fees when a Boston pilot seasonably offers his services: But if no Boston pilot seasonably offer his services, the master may employ any other person to pilot his vessel in, and such person may do so, without incurring any penalty.

When a Boston pilot seasonably offers his services to the master of a vessel bound into Boston harbor, and the master of the vessel does not accept the services, but employs a person who is not authorized as a pilot for said harbor, to pilot his vessel in, the master thereby incurs no penalty; but such person, by undertaking to pilot the vessel in, incurs the penalty imposed by the Rev. Sta. c. 32, § 23.

The payment of pilotage fees by a master of a vessel, who has declined an authorized pilot's seasonable offer of service and employed an unauthorized person to pilot the vessel in, is not the payment of a penalty, and is no bar to an indictment against such person for undertaking to pilot such vessel in.

The pilots, who are authorized to pilot vessels through the Vineyard Sound, over Nantucket Shoals, have no authority, by the Rev. Sta. c. 32, § 42, to pilot the same vessels into Boston harbor: And when one of them undertakes to pilot one of such vessels into that harbor, at the request of the master thereof, and is indicted for so doing, his warrant, as such pilot, is not admissible in evidence, in his defence, even for the purpose of showing that he was lawfully on board such vessel.

Under the Rev. Sta. c. 32, § 24, it is a sufficient offer of a pilot's services, in the night, to the master of a vessel bound into Boston harbor, if the pilot approaches such vessel and hails her, and makes all the tender which the time and circumstances permit, and his hail is heard on board, though it is not answered: It is not necessary, in such case, that there should be an actual offer to the master, and that he should have actual knowledge of such offer.

When an authorized pilot seasonably offers his services to the master of a vessel bound into Boston harbor, and the master, without requiring the pilot to show his warrant, declines to accept his services, and employs an unauthorized person to pilot his vessel in, and such person is indicted for undertaking to pilot her in, he cannot defend on the ground that there is no proof that the pilot had his warrant with him when he offered his services.

Depositions in perpetual remembrance, taken before an indictment is found, are not admissible on the trial of the indictment.

When a jury, after a cause is committed to them and they have gone out, return and make an inquiry of the court, as to a fact, it is within the discretionary power of the court to admit testimony respecting the matter of such inquiry.

A Boston pilot offered his services to S., the master of a vessel bound into Boston harbor, and S. did not accept them: The pilot subsequently claimed pilotage fees of S., and they both went before a commissioner of pilotage and submitted the claim to his decision: S. stated to the commissioner, that he was a stranger, &c., and that when he approached the harbor, he had a pilot on board whom he had said: R. was afterwards indicted and tried for undertaking to pilot S.'s vessel into

the harbor; and on the trial, the statement made by S. to the commissioner was offered in evidence against R. *Held*, that it was inadmissible.

THE defendant was indicted and tried in the municipal court, at the December term thereof, 1842, for undertaking to pilot the barque *Empress*, a foreign vessel, into the port of Boston, on the 3d of April 1842, in violation of the provisions of the Rev. Sts. c. 32.

It was in evidence at the trial, that said barque was a foreign vessel, of 345 tons burthen, and had been chartered in New York, by B. P. Winslow, to come to Boston and thence to go to London. Three commissioned pilots for the port of Boston testified, that they hailed said barque, on the night of the 3d of said April, about four miles outside of the line mentioned in the Rev. Sts. c. 32, § 24; but that although the barque was within hailing distance and they could hear the creaking of her blocks, and from their position at the windward of her, they believed their hail must have been heard; and although they followed her for some time and repeated the hail; yet no answer was returned. An other Boston pilot testified, that the *Empress* came up, that night, in the wake of the *Ranger*, a barque which he was piloting in at the same time, and that she came to in the harbor of Boston within 300 rods of the *Ranger*, and was there at anchor on the next morning. Another Boston pilot testified, that the defendant boasted to him, some weeks afterwards, that he came to Boston in the barque *Empress*.

In the defence, and to show that the defendant was lawfully on board the *Empress*, he offered his warrant as a branch pilot for the coast of Martha's Vineyard and over Nantucket Shoals.

But the judge ruled it out; being of opinion that it did not authorize the defendant to pilot the *Empress* into the harbor of Boston, when a Boston pilot had tendered his services. It was then stated by the defendant's counsel, that the warrant tended to prove that he was lawfully on board at the time. The judge remarked that if the defendant was on board the barque with the captain's consent, he was lawfully there.

The defendant contended that it was incumbent on the pilot, who tendered his services, to have his warrant with him at the

time. But the judge ruled, that as no answer was returned from the barque, and no warrant demanded, it was not necessary to prove that the pilot then had his warrant with him ; and that it was to be presumed, under the circumstances, that he would have shown his warrant, if demanded.

It was in evidence, that when the master of the *Empress*, captain Scott, was called upon in Boston for the pilotage fee, he refused to pay ; that he and a clerk of said B. P. Winslow then went with S. Colby, the pilot who demanded his fee, to Caleb Curtis, Esq., one of the commissioners of pilotage in the harbor of Boston, " and appealed to him whether the fee should be paid." The defendant objected to the admission in evidence of what took place and was said at that time, in his absence. But the objection was overruled ; and it was testified, that captain Scott, on that occasion, said he was a stranger, and that on the night of said 3d of April he was below deck and had a pilot on board, to whom he had paid five dollars for the service. The commissioner decided that the pilotage was due, according to usage, but as the captain was a stranger and had paid five dollars, it would be hard to require him to pay it again ; and it was determined that the pilot's bill should be paid, deducting five dollars. It was accordingly so paid.

The defendant contended that the master of the vessel only was liable to the penalty mentioned in the Rev. Sts. c. 32, § 23. But the judge instructed the jury, " that when a master refuses the services of a pilot, duly tendered, and chooses to conduct his own vessel into port, he is entitled so to do, or to employ another person ; but that the pilot earns his full pilotage fee, by the tender, and is entitled to demand it : That this was not a penalty on the master, in its legal acceptation : That while the law secured to the master the right to pilot his own vessel, it gave the pilot the reasonable reward of his service : That though a master might lawfully refuse to employ a pilot who tendered his services, and might pilot his own vessel, it would not justify a third person, not having a warrant nor duly authorized, to undertake to pilot the vessel into the harbor : That such person would incur the penalty ; but the master would still be liable to

pay the full pilotage : And further ; that the payment of the pilotage by the master, under such circumstances, would be no bar to the penalty claimed of such unauthorized person."

The defendant contended that the pilot's offer of service must be an actual offer to the master of the vessel, who must have actual knowledge thereof, and that hailing the vessel was not sufficient. But the judge ruled, that if the jury believed that there was all the tender, in this case, which the time of night and the circumstances permitted, and that it was heard on board, although not answered, it was sufficient : And further ; that captain Scott should have been ready himself, or have appointed some other officer of the vessel, to answer the hail and to receive the pilot, if any offered.

The defendant offered in evidence the depositions of captain Scott and Stephen Larkin, master and mate of the Empress, taken *in perpetuum* before the finding of this indictment. These depositions were ruled out.

The judge finally instructed the jury, that if they believed, from the evidence, that the defendant did pilot in the Empress, as alleged in the indictment, they must find him guilty ; but if they were not satisfied of that fact, he was entitled to their verdict of acquittal.

After the jury had been out some time, they were permitted to return, and they inquired as to the fact whether the Empress had ever before been in the port of Boston. The judge thereupon remarked, that it was conformable to the practice of the court in such cases, to call the witness and to permit the jury to make any additional inquiry. The counsel for the defendant stated to the judge that they did not assent to the recalling of any witness. An officer was sent to call in B. P. Winslow, (who had chartered the Empress,) to answer the inquiry made by the jury. While the officer was gone, inquiry was made, on this point, of one of the pilot commissioners, who had been before examined as a witness, and he made certain statements rendering it probable that the Empress had never before been in Boston ; and when he was asked by the defendant's counsel whether he had previously testified as to that point, he declined a positive answer.

The judge then referred to his minutes, and told the jury that it was proved on the trial, that the barque was a foreign vessel, and that captain Scott was a stranger in the port of Boston ; and that, in the absence of all evidence to show that either the captain or the vessel had ever been in Boston before, the jury had a right to infer that they had not.

The jury found the defendant guilty, Whereupon the defendant alleged exceptions to all the foregoing opinions and rulings of the judge.

J. M. O'Brien & Wellington, for the defendant.

Austin, (Attorney General,) for the Commonwealth.

The opinion of the court was made known March 25th 1844.

SHAW, C. J. An indictment was found, in the municipal court, against the defendant, alleged to be an inhabitant of New Bedford, for a violation of the pilot laws regulating the pilotage of foreign vessels into the port of Boston. The general statement, to be gathered from the averments in the indictment, is, that the defendant, not being commissioned as a pilot for the port of Boston, did, in April 1842, pilot a foreign vessel, called the barque *Empress*, into Boston harbor, although certain regular Boston pilots offered their services before the vessel arrived at "a line drawn from Harding's Rocks to the Outer Graves, and from thence to Nahant Head," being the line fixed by law, (Rev. Sts. c. 32, § 24,) on the easterly or outside of which the commissioned branch pilots must offer their services to inward bound vessels, in order to entitle themselves to their fees.

The first and by far the most important inquiry in the present case is, what is the true construction of the several provisions in the revised statutes ? Is there any apparent conflict in the different provisions ; and if so, how and upon what reasonable construction can they be reconciled ? These are questions not only deeply affecting the rights of a hardy and highly meritorious class of persons engaged in the public service, but also those of shipmasters and merchants, and through them the great interests of commerce and navigation.

Some general considerations may have their weight in enabling us to put a construction upon this law, before coming to

its precise provisions. It is obvious from the course of legislation upon this subject, that it has been, for a series of years, the wise policy of the law of this Commonwealth to provide for the employment of a body of men, as pilots, of competent skill and experience, to take charge of vessels both inward and outward bound, so placed and in such numbers that their services can readily be commanded by those in need of them. The requisite skill and experience are insured by providing that they shall receive their authority by a public appointment, upon the recommendation of persons of established experience and skill themselves ; that they shall give bond for the faithful performance of the duties of their office, and be responsible for all losses occasioned by negligence, carelessness or want of skill. They are required (we speak of inward pilots) to cruise at a considerable distance off the coast, whenever the weather will permit, to be ready at once to offer their services to vessels that need their aid ; and it is obvious that the more boisterous the weather, the more their services are needed, especially by strangers. It is further the manifest policy of the law to encourage capable and responsible persons to undertake this laborious office, and faithfully to perform these meritorious and somewhat hazardous services, by securing to them the exclusive privilege of piloting vessels, and the enjoyment of the fees fixed by law. This exclusive right to take fees from all vessels to which their services are seasonably offered on the coast, whether accepted or not, and to take the fees fixed by law, which may seem large and perhaps somewhat extravagant for their services, when done by daylight, in fair weather and at a moderate season of the year, serves as a compensation to them for performing the same services in the darkness of night, in stormy weather, and at an inclement season. And considering the nature and importance of their services at all times, and the varying circumstances under which they must be performed, it seems that their exclusive privilege is fairly purchased by corresponding benefits to the public ; and therefore it is fit that it should be guarded by penalties upon those who would encroach upon it, and who have given no such guaranties to the public for skill, good conduct.

and faithful devotion, at all times, to this service. The fees are undoubtedly intended to be so graduated, that taking favorable and unfavorable times together, they shall form a reasonable compensation for the whole service.

There certainly appears to be some discrepancy between different provisions of the revised statutes ; but, as these constitute but one act, enacted and going into operation at the same time, it is the duty of the court so to construe them as to give effect to each clause, as far as practicable, and to pronounce no part void, unless they are so contradictory that the one or the other must yield.

The provisions of law, as they now stand in the revised statutes, consist of *general* provisions, apparently intended to apply to all ports and places within the jurisdiction of the State ; and *special* regulations, adapted to pilotage into the ports of Boston, Salem, Newburyport, New Bedford and Fairhaven, and through the Vineyard Sound and over Nantucket Shoals. In the *general* provisions, Rev. Sts. c. 32, § 12, it is declared, that any master of a vessel, (other than fishing vessels, &c., excepted in § 7,) "who may choose to pilot his own vessel into or out of any port, shall be permitted to do so ; but he shall, notwithstanding, be liable to pay to such pilot of the port as shall first come on board of his vessel, the full pilotage according to the fees specified in his warrant."

In the *special* provisions regulating pilotage for Boston harbor, (§ 23,) it is declared, that "if any person, not having a branch, commission or warrant, as a pilot or pilot's apprentice, for the harbor of Boston, shall undertake to pilot into or out of said harbor any vessels, excepting such as are excepted in § 7, he shall forfeit a sum not exceeding \$ 50 for each offence." This is the section upon which the present prosecution is founded.

The next section, § 24, declares, that "in case no Boston branch pilot shall offer his services to the master of a vessel bound into the harbor of Boston, before the vessel shall have passed a line drawn from Harding's Rocks to the Outer Graves, and from thence to Nahant Head, such master shall be at lib

erty to pilot his own vessel, or to employ any other person to pilot his vessel into the said harbor, without incurring the penalty mentioned in the preceding section."

If these two last sections stood alone, it would seem very manifest, that the 23d section, imposing the penalty upon *any person*, without exception, who should undertake to pilot a vessel in, would include the master, as well as any other person. And this construction would seem to be strengthened by the 24th section, declaring that if no Boston pilot seasonably offer, the master shall be at liberty to pilot his own vessel, or to employ any other person, *without incurring the penalty*; implying that he would incur the penalty by piloting his own vessel, or employing another, if a Boston pilot had seasonably offered. But this is irreconcilable with the 12th section above cited, which provides, that if a master chooses to pilot his own vessel, he may do so, paying the regular fees, as if a regular pilot were in fact employed. If he is permitted to pilot his own vessel, then it is not unlawful; he commits no offence, and incurs no penalty. The liability to pay the fees, in such case, is a compensation for services tendered, and not a penalty. Apparently contradictory as these provisions are, they are to be reconciled, if possible, by a reasonable construction.

One obvious remark, common to this and other parts of the revised statutes, is this; that although, as positive law, they all took effect at the same time, yet they were, in most instances, revisions of former acts made at different times; that is, the re-enactment of former acts, with some modifications. When statutes are passed at different times, with conflicting provisions, the later repeals the prior, without any repealing words; because the last formal and constitutional expression of the legislative will is the governing law. This rule cannot apply to earlier and later sections in the revised statutes, for the reason already alluded to, viz. that although earlier or later in the order in which they are placed in the statute, they were all enacted simultaneously, and no one repeals another. But as they were taken from statutes passed at different times, it may in some manner account for the use of terms apparently contradictory

The first act, it is believed, under the constitution, was *St.* 1783, c. 13, "for regulating pilotage in several ports of this Commonwealth." It recited that frequent and heavy losses had been sustained, and navigation greatly injured, for want of a well regulated pilotage. It provided for the appointment of pilots by the governor and council; required them to take an oath and give bond; assigned their districts, regulated their fees, and subjected them to responsibility for losses, with various regulations. Sect. 6th provided that any master of a vessel, who might choose to hazard the pilotage of his own vessel into any port, should be at liberty to do so, subject to the payment of one half the regular fees to the first pilot who should come on board; and it gave such pilot an action to recover the amount. Sect. 7th provided, that if no regular pilot should offer before a vessel had arrived within certain limits, and the master should then decline taking a pilot, he should be exempt from any fees of pilotage. This plainly implied, that if the offer was seasonably made, the master was liable for half the fees, whether he accepted the offer or not. This, it is believed, is all the provision then made to insure to the regular pilots the exclusive right to pilot vessels in, and take their fees. No penalty was imposed on any unauthorized person. It was probably considered sufficient to secure the exclusive privilege to the regular pilots, that fees were to be paid if their services were tendered, whether accepted or not.

This statute, it is believed, with some slight modifications, constituted the basis of the law on the subject of pilotage, until 1829, when an act was passed specially regulating the subject of pilotage for the harbor of Boston. *St.* 1829, c. 2. The 1st section of this act prohibited any person from undertaking to pilot any vessels (except fishing vessels, &c.) into the harbor of Boston, without having first obtained a commission, under a penalty of \$ 50; with a proviso in § 4, that if no Boston pilot should offer his services, &c., such master should be at liberty to pilot his own vessel, or employ any other person to pilot it into Boston harbor, without incurring the penalties of the act. This act made further provisions as to the appointment of pilots, and repealed all laws inconsistent with its provisions.

Here we perceive the origin of §§ 23 and 24 of the 32d chapter of revised statutes. It had probably been ascertained, by some experience, that unauthorized persons, either by misrepresenting themselves to strangers, or otherwise, were in the habit of interfering in the business, to the injury of the regular pilots, and that it had become necessary to restrain them by a penalty. This difference between the case of Boston and the other ports was probably occasioned by the fact, that the navigation of this city being so much larger than that of any other port in the State, the temptation to violate the law was greater.

But the remark upon this statute most material to the present case is this; that as it imposed a penalty of \$50 upon *any person*, not a commissioned pilot; as there was no clause—as in the *St.* of 1783—authorizing a master to pilot his own vessel; and as this act repealed all prior inconsistent acts; we are strongly inclined to the opinion, that as the law then stood, the master would have incurred the penalty by undertaking to pilot his own vessel.

An additional act was passed in 1835, providing for the mode of appointing pilots, the securities to be taken of them, regulating their fees, and providing also for the appointment of pilot commissioners having a superintending jurisdiction on the subject, but not changing the law as to the right of the master to pilot his own vessel, nor as to his liability, or that of any other person, to the penalty provided in the act of 1829. *St.* 1835, c. 149.

Thus stood the law, when the revised statutes were passed; and we are again brought back to the question, how § 12 of c. 32, making it lawful, in all cases, for a master to pilot his own vessel, can be reconciled with §§ 23 and 24, imposing a penalty upon “any person,” and with an implication which seems so to extend this prohibition as to include the master.

We have no doubt that it was the intention of the legislature, in the revised statutes, to reenact that provision of *St.* 1783, which made it lawful for a master to pilot his own vessel—with this alteration, that instead of paying half the fees of pilotage in that case, he should pay the full fees; thereby taking

away all temptation to employ unauthorized persons, or to undertake to pilot his own vessel. In either case, he would save nothing.

The only question upon this point of the case was, whether this particular provision included the harbor of Boston, or only the other ports of the State, not extending the same liberty to masters coming into the port of Boston, to pilot their own vessels, even on paying full pilotage.

As there seemed to be a distinct series of regulations for Boston, and as there were several other ports to which the other general regulations applied, and as these were manifestly the revision of acts passed at different times, the former for the State at large, and the latter for Boston, we were at first inclined to take this view of it. But upon further consideration, we are of opinion, that this construction is not the true one. The 12th section is general in its terms ; there is nothing in the words to show that it was not intended to apply to Boston ; and we think it would be too narrow and forced a construction to hold, without such terms of restriction, that it does not include the port of Boston.

Considering both provisions, then, as reënacted and in force, both having been passed at the same time, we are of opinion, that the true construction is this : By § 12, a master may always pilot in his own vessel, being liable always to pay the full pilotage. But this liability for pilotage is not regarded as a penalty, but rather as a compensation to which the regular pilot is entitled, for services tendered, and of which the master might have availed himself, if he wished. It follows, therefore, that a master can never incur the penalty of \$50. But this privilege is a personal one to the master himself, and he cannot, under color of such personal right, authorize a person, not commissioned as a pilot, to pilot in a vessel, without incurring a penalty. Indeed, to hold that he could, would be in effect a repeal of the law. For as no person, seaman, passenger, branch pilot of another station, or other person, can pilot a vessel in, without being authorized or permitted so to do by the master, the penalty could never be incurred by any person.

Then comes the 23d section, which imposes a penalty upon "any person" not having a branch, commission or warrant, for undertaking to pilot in, &c. This clause, if it stood alone, by *any person*, would include the master. But it does not stand alone. It is part of the same statute which authorizes the master, as a personal privilege, to pilot his vessel in. The words *any person*, then, must be necessarily taken to mean, "any person except the master personally." It will operate, as we think it was intended to operate, to deter all unauthorized persons from professing and undertaking to act as pilots, either for compensation below the regular pilotage fees, or otherwise. It will include persons boarding the vessel from boats, and pretending to be commissioned pilots—and thus deceiving strangers—and prohibit subordinate officers, or seamen, or passengers, or branch pilots from other stations, not commissioned for this port, from undertaking to act as pilots; of which their actually piloting the vessel in, and especially taking any fee or compensation, as pilotage or as a gratuity, would be very strong evidence.

There is some difficulty in reconciling the phraseology of the 24th section with this construction. It is, that if "no Boston branch pilot shall offer his services to the master of a vessel bound into the harbor of Boston, such master shall be at liberty to pilot his own vessel, or to employ any other person to pilot his vessel into said harbor, without incurring the penalty mentioned in the preceding section;" that is, the penalty of \$ 50.

It was urged at the argument, that this latter clause implies, that the penalty of the preceding section is incurred by the master, and not by the party undertaking to pilot. But this is not only contrary to what we understand to be the policy of the act, but contrary to the express words, which impose the penalty upon the person undertaking, not upon the master employing him. Then the intent of the 24th section is, that if a Boston branch pilot does not seasonably offer his services, the master may pilot in the vessel himself; but as this had been provided for before, it adds no new power; and the phrase was probably retained through inadvertence, by being copied from another statute, where, as we have before seen, it had a meaning. But

the alternative provision is, that he may employ any other person, without incurring the penalty. Now if he may lawfully employ any other person, such person may be lawfully employed, and will therefore commit no offence, and incur no penalty. If we are right in the former construction, the master would incur no penalty, for none is imposed on him, either for piloting in his own vessel, or employing another to do so ; because his liability to pay the regular pilotage is not a penalty at all, and the penalty mentioned in this section is the penalty of \$ 50. The only meaning, therefore, and the necessary construction is, that the master may employ any other person, without his (that is, such person's) incurring the penalty. This is not the strict grammatical construction, but it is the rational, and we think the legal construction, and reconciles the different provisions of the revised statutes with each other. Taking the whole together, then, the result will be this : Every Boston pilot, who shall offer his services to an inward bound vessel of the class mentioned, before she shall have arrived at the line designated, will be entitled to his full fees, whether his services are accepted or not. Every master may personally pilot his own vessel in, liable only to the payment of fees of pilotage. If no Boston pilot offer before the vessel arrives at the line, then the master may do the same thing without paying any fee. But if such offer have been made, no unauthorized person shall undertake to pilot a vessel in, whether falsely representing himself to be a pilot or not, or whether employed by the master or not, under a penalty of \$ 50. If, however, no branch pilot offer before the vessel has arrived at the line designated, then the master may employ any other person, at his pleasure, and such person may lawfully pilot the vessel in, without committing any offence, or incurring any penalty.

This view of the law disposes of the principal exception taken to the decision of the judge of the municipal court, and his instruction to the jury. This exception was as follows : " The defendant contended, that the master of the vessel only was liable to the penalty mentioned in the Rev. Sts. c. 32, § 23. But the judge instructed the jury," &c. [Here the chief justice recited the

instruction, as fully set forth, *ante*, 414.] This instruction, we think, for the reasons already given, was correct in matter of law, and open to no exception. This extends to both points, viz. that the master, by employing an unauthorized person, did not incur the penalty; that the unauthorized person himself did incur the penalty, and that the payment of pilotage by the master was no bar.

Several other exceptions were taken, which we will consider in their order.

1. It is objected that the warrant of the defendant, as a pilot in the Vineyard Sound and over Nantucket Shoals, which was offered in evidence, was improperly rejected. It is, we think, very clear, that such warrant gave him no authority to pilot a vessel into Boston harbor.

There is a provision in Rev. Sts. c. 32, § 42, which, if it stood alone, and hastily read, might seem to imply such an authority. The provision is, that "any person who shall faithfully and skilfully pilot any vessel through the Vineyard Sound over Nantucket Shoals, to her port of destination in Boston Bay, or eastward thereof, shall be entitled" to certain fees specified; with a proviso, that it shall not extend to any case where a different agreement is made. Taken in connexion with the other provisions of this chapter, it is obvious that this section, which was revised from a special act passed in 1820, (*St.* 1819, c. 155,) was intended to regulate pilotage over the shoals into Boston Bay or eastward thereof, and not to pilot vessels into Boston harbor, or any other harbor in the bay. Any other construction would be repugnant to the general terms of the act, which provides, § 8, for the assignment of districts to the several pilots; § 7, which authorizes each pilot to take charge of any vessel, bound into the port assigned to him; and § 23, which prohibits any person "not having a branch commission or warrant, as a pilot or pilot's apprentice for the harbor of Boston."

If then the defendant had any warrant as a Vineyard pilot, it had no tendency to excuse him, and any argument to that effect, founded on it, could only tend to mislead the jury. Indeed, it was not avowedly offered for that purpose, but to prove that the

defendant was lawfully on board. As the judge very properly remarked, it was not necessary for that purpose, as it was to be presumed, if he was on board with the consent of the master, that he was lawfully on board. In truth that fact was not contested, and if it had been, his commission, as pilot, had no tendency to prove it, without proof that he had been employed as pilot to bring the vessel over the shoals ; and such proof would have been as efficacious for that purpose, without the warrant as with. If he was lawfully employed at an anterior stage of the voyage, that employment had ceased when the vessel reached the Boston pilot ground ; and he was then on board as a passenger coming to port on his way home, because he could not be landed sooner. We think that evidence was very properly rejected.

2. The next objection is, that the regular pilot, who offered his services, should have proved affirmatively, that he had his warrant with him. The provision of Rev. Sts. c. 32, § 7, which authorizes the regular pilot to take charge of every inward bound vessel, of a certain description, adds, "the said pilot first showing his warrant to the master, *if required.*" The first act, imposing on him the duty of exhibiting his warrant, was to be done by the master in requiring it ; and until that was done, he was in no default in not showing it ; and the master had no right, on that pretence, to reject his services and employ an unauthorized person. Proof that he had it with him, therefore, was not necessary, to prove the act of the defendant unlawful, and charge him with the penalty.

3. The next exception was to the admission of statements and declarations made by captain Scott, in the absence of the defendant ; which evidence was objected to at the trial. This exception appears to us to be well taken, and must be sustained. We can perceive no ground, on which this can be taken out of the rule, which excludes hearsay testimony. One ground of exception from the general rule, urged by the Attorney General, was, that this was evidence of what took place before the pilot commissioners, or one of them, and that they had by law a summary jurisdiction on the subject of pilots and pilotage

But the answer we think is, that they had no jurisdiction over the subject of the penalty, no authority to enforce it, or remit it, or receive satisfaction for it. The object of going before the commissioners was to obtain the pilotage fees of the master for the pilot who was entitled to them. The two proceedings were instituted and conducted *alio intuitu*, against different parties, and for different purposes. The commissioners did not profess to act at all on the subject of the penalty, but only on the subject of pilotage. Another answer to the objection was, that the declarations of the master were wholly immaterial, and could have had no influence on the jury. But we cannot so consider it. The declaration of captain Scott before the commissioner, when he was called on for the pilotage and objected to paying it, was, that he was a stranger, and was below, and had a pilot on board at the time, to whom he had paid five dollars. Now if proved *aliunde*, as we may presume it was, that the defendant was that pilot, the words appear to us to be very significant. They show that the defendant in fact piloted the vessel in, if he did not even do it under color of his office as pilot on another part of the coast, and so deceived captain Scott, as to his authority ; and what is very essential, that he, captain Scott, paid, and of course that the defendant received, five dollars for the service. We are of opinion that this evidence should not have been admitted.

4, 5, 7. These exceptions have been already answered ; viz. that the master only incurred the penalty ; that payment of the pilotage by the master was a satisfaction of the penalty due from the defendant ; and that the Commonwealth was estopped from claiming the penalty. We think they are all wholly untenable. The commissioner did not act or profess to act for the Commonwealth, nor do any thing in relation to the liability of the defendant for the penalty.

6. The sixth exception was, that the depositions of captain Scott and Stephen Larkin, taken in *perpetuam*, before the indictment was found, ought to have been received in evidence.

Before the passing of the revised statutes, it was a well established rule of evidence in criminal cases, that all testimony, on

both sides, must be *viva voce* at the trial, unless admitted otherwise by express consent. By the Rev. Sts. c. 136, § 32, it is provided, that when issue shall be joined on an indictment, the court may, on the application of the defendant, issue a commission to take depositions. These depositions, taken before the indictment was found, are clearly not within this provision of the statute, and being otherwise inadmissible by law, we think they were rightly rejected.

8. The next exception is to the ruling and instruction of the judge as to the ground taken by the defendant, that the offer of services must be an actual offer to the master, and that he must have actual knowledge thereof; and that hailing the vessel was not sufficient. [The ruling and instruction were recited by the chief justice, as they are stated, *ante*, 415.] We are of opinion that this instruction was correct in all particulars. When the statute speaks of an offer of services by a pilot at sea, it refers to the subject matter for its construction. A nautical communication must be made in nautical language, a language probably as well understood by nautical persons of all languages, engaged in navigation, as any technical language of the law in this court. The exception implies that if the master of a vessel on the coast, under sail at midnight, chooses to keep his cabin, and direct no person to answer a hail, it will be the duty of a pilot to run along side the vessel, under full sail, to go on board and present himself to the master, and offer his services — a thing we suppose manifestly impossible. As to the other part of this instruction, to which objection was taken in the argument, in reference to the duty of the master, we think it was also correct.

A vessel on the coast, inward bound, and under sail, must be presumed to have, and if properly managed must have men on deck, who, in the absence of the master below, must stand in his place and be under his orders; and therefore the judge was right in saying that it is the duty of the master to be on deck, or to have some officer or person in charge of the watch, to do duty in his absence, and either to answer a hail rightfully made, or immediately inform him of the fact. We think therefore the

Prescott v. Williams, Administrator.

only question was one of fact, rightly left to the jury, whether the pilot boat was so near and in such a position, that the hail was, or might, if the officers and crew had been on duty, have been heard on board the barque ; and if it was, that this was a sufficient offer and tender of services.

9. An objection was taken to the course of the judge at the trial, in admitting testimony after the jury had been out. We think it was a matter depending wholly on the discretion of the court. The order of receiving evidence is adopted for convenience, and may be varied, according to particular circumstances. As to the objection to the recapitulation of the evidence of the declarations of captain Scott, the same objection lies to it, as to the admission of that testimony, and no other.

We are of opinion that all the exceptions, except that, must be overruled ; but on account of the admission of that evidence, the verdict must be set aside and a new trial granted. And the case will be remanded to the municipal court, for that purpose.

JONATHAN PRESCOTT vs. AARON D. WILLIAMS,
Administrator.

The owner of a water mill has an easement in the land below, for the free passage of the water from the mill, in the natural channel of the stream, accompanied with a right to enter upon the land for the purpose of clearing out the stream and removing obstructions to the free flow of the water.

Where land, which is conveyed by deed, is described as land "through which the water from a mill passes," and the grantor inserts a covenant in the deed, that the granted premises are free from all incumbrances, the existence of a right in the mill owner to cleanse the natural channel of the stream and remove obstructions to the free flow of the water from the mill is not an incumbrance, within the meaning of such covenant.

In an action of covenant broken, the plaintiff alleged in his declaration that the defendant's intestate, David Dudley, by a deed, dated April 20th 1835, conveyed to the plaintiff a parcel of land in Roxbury, and therein covenanted that the premises, so conveyed, were free from all incumbrances, and that he would warrant and defend the same against the lawful claims and demands of all persons ; "but that there was, long before and at the time, and

ever since the making of said deed and covenants, the right in the owners and occupants of a certain ancient mill, near and above said premises, to have the water pass off from the wheels of the same through said premises, in an artificial raceway, and different from and other than the natural stream ; the said right being appurtenant to said mill ; and also in said owners and occupants of said mill the right to enter on said premises, conveyed as aforesaid to the plaintiff, at their free will and pleasure, and to dig up and remove all materials obstructing the full flowing of the water from said mill, and to dig up the soil and make and repair convenient ditch or ditches, or sluiceways, to carry off said water through or over said premises ; and by virtue of said right, the owner and occupant of said mill hath, since the execution of said deed and covenants, entered upon said premises and dug up stones and gravel from said raceway, against the will of the plaintiff, and the same left on said premises, to the great injury thereof ; which said right and incumbrance is in no way extinguished, but in full force, and has been settled in a court of law, of competent jurisdiction, rightfully to pertain to said mill and to be lawfully exercised by the owners and occupants thereof ; and the plaintiff hath been put to great costs and charges, in settling said right in a court of law."

At the trial before *Dewey, J.* the plaintiff produced the deed declared on, which, after describing the land by metes and bounds, had the following words : " Supposed to contain 135,000 square feet, be the same more or less, through which land the water passes from the grist mill, and the waste water from the mill pond, in separate channels." There was a covenant in the deed, that the granted premises were free from all incumbrances.

The plaintiff also introduced evidence to prove the existence of the stream mentioned in his declaration, and that the owner of said mill had a right to enter on the land aforesaid and cleanse the bed of said stream, whenever it was necessary to do so ; that this right was adjudged to be in the mill owner, by a decision of this court, in a suit brought by the plaintiff against Richard White (21 Pick. 341) for an alleged trespass on the premises

m question, in entering thereon, digging up and subverting the soil, and throwing earth on the plaintiff's garden ; that the plaintiff had personally attended to the conducting of said suit, and had expended money therein ; which money and the value of his personal attention to said suit, he claimed as part of the damages sustained by him by reason of the said alleged breach of covenant.

The judge, for the purpose of the trial, and to reserve the questions raised by the defendant, instructed the jury that a right, in the owner of said mill, to enter and cleanse the stream, would be an incumbrance on the premises conveyed by said deed, and a breach of the covenant therein contained ; and he directed the jury (if they should find for the plaintiff) to specify in their verdict, 1st, the damage they should assess for the existence of said easement ; 2d, what knowledge or notice, if any, said Dudley had of the pendency of the plaintiff's suit above mentioned against White ; 3d, how much the plaintiff had expended in said suit for counsel fees and witnesses ; 4th, how much he expended in costs paid to said White ; 5th, whether said stream was an artificial or a natural one ; and 6th, whether the owners of said mill had, by adverse use, acquired the right to enter and cleanse it out.

The jury found that the defendant's intestate had broken his covenant, and assessed \$ 5 damages for the alleged easement in the premises conveyed : They also found that said Dudley received information of the suit pending between White and the plaintiff, but did not find that Dudley had notice of the pendency of the same by any direct notice from the plaintiff : They also found the amount paid by the plaintiff for counsel fees, and costs of witnesses, in prosecuting said suit, and the taxable costs paid by him to White, and the sum to which he was entitled for his own services and personal expenses in attending to said suit : They also found that said watercourse was a natural one, and that the right to enter upon the premises conveyed to the plaintiff, to make the necessary improvements of the same, for its use for said mill, had been exercised adversely by said White and those under whom he claimed, as early as the year 1807,

and from that time to the time of the trial, as occasion therefor required.

“ If, from the foregoing statements and the facts found by the jury, the whole court shall be of opinion that the right of said mill owners to enter on the conveyed premises is not an incumbrance, or if, being an incumbrance on the said premises, it is not covenanted against by said Dudley in said deed, then the verdict is to be set aside and judgment rendered for the defendant ; otherwise, judgment to be rendered on the verdict for the damages assessed for the existence of the easement, and for such other items of damage enumerated in the verdict, as the court shall decide that the plaintiff is entitled to recover in their action.”

E. D. Sohier, for the defendant.

B. Rand & A. Cushing, for the plaintiff.

DEWEY, J. The first question is, whether, upon the facts found in the case, the plaintiff has established the alleged breach of covenant in the deed of the defendant's intestate. The institution of the plaintiff's suit against Richard White, and the proceedings therein, and final result thereof, do not of themselves establish such breach of covenant. It is true that the plaintiff failed to maintain his suit, and that judgment was rendered for the defendant White ; but the present defendant is not bound by the result of that case, inasmuch as his intestate was not a party to it, and the plaintiff did not give him notice of the pendency thereof, and did not request his aid in sustaining his title against White. The judgment in that case, therefore, can have no other effect than what may result from the decision of any general legal principles involved in it, and which may be applicable to the case at bar.

But there is obviously a material difference in the facts, as stated in that case, and those found by the jury in the present case. In the case of *Prescott v. White*, 21 Pick. 341, the easement in controversy was assumed to be an artificial canal or raceway, the right to which White established to be in himself, as the owner of the mill above ; and he justified an entry on the land of Prescott, to cleanse said canal. The great question there

was, as to the effect of a grant of an easement of that character, as respects the right of the grantee, and those claiming under him, to enter upon the land through which such raceway passed, to make necessary repairs and remove obstructions in the same ; and upon much consideration it was held that the owner of the mill, having such easement, had the right to enter upon the land through which the raceway passed, and clear out the obstructions in the same, in the usual and ordinary mode in which such raceways or artificial canals are cleansed, doing no unnecessary damage ; and it was held that White was justified in his entry, and that Prescott held his land subject to this right of entry as incident to the enjoyment of this easement, which had been granted to the owner of the mill above. Upon such a state of facts, there would be an existing incumbrance upon the premises conveyed to the plaintiff by Dudley ; the right to have and enjoy this supposed artificial watercourse being held to have attached to it the secondary easement of entering upon the land through which it passed, to cleanse the same.

But upon the trial of the present action, (and it is solely upon the facts found in this case that Dudley's estate can be charged upon his covenant,) the jury have found that the stream of water passing through Prescott's land was a natural watercourse, and not an artificial raceway or canal, as had been supposed and assumed in the trial in the former case. This materially changes the features of the case, and presents the inquiry, whether the existence of an easement, in the land conveyed, of a mill owner above, in a natural stream passing through such land, accompanied by the further fact that such mill owner above had for more than thirty years, as occasion and necessity required, entered upon the land conveyed, to remove obstructions in, and to cleanse out the stream, shows such an incumbrance upon the premises conveyed, as to subject the grantor of such premises, who conveys them with the usual covenants of warranty and against incumbrances, to an action for breach of his covenants.

The right of the owner of a mill privilege to have a natural stream of water pass off freely over the land of an owner below would not of itself create any liability for damage upon any such

Prescott v. Williams, Administrator.

covenants attached to the conveyance of the land below. The question then is, whether the further fact found by the jury, that the owner of the mill above had, for thirty years past, as occasion required, entered upon the land below, cleansed out this stream and removed the obstructions therefrom, shows the existence of any incumbrance on the premises conveyed, that will sustain the present action. This depends upon the view to be taken of another question, viz. does the right to have a natural stream of water flow freely over the land of the proprietor below, attach to it, as an incident, the right to enter on the land below to cleanse out the stream and to remove obstructions? If it do so, then there was no artificial easement or right of servitude as to the lands below, created by compact or acquired by prescription, or indeed any servitude beyond what ordinarily accompanies a natural stream; and of course there was no breach of the covenants contained in the deed to the plaintiff.

It is somewhat remarkable that there should be found so little direct authority bearing upon this question. Some general principles are, however, well settled, from which we may derive aid in settling this point. Now we find it stated in books of authority, that "the express or implied grant of an easement is accompanied by certain secondary easements necessary for the enjoyment of the principal one." Gale & Whatley on Easements, (Amer. ed.) 231. So also, "in the civil law, the right to a servitude drew with it a right to such secondary servitudes as were essential for its enjoyment." *Ib.* Again, it is said, that "by the civil law, the owner of the dominant tenement had a right to do whatever was requisite to secure to himself the fullest enjoyment of his servitude." 232. "But in entering upon the neighboring soil for the purpose of doing these necessary works, the owner of the dominant tenement was bound not only to exercise ordinary care and skill, but also to repair, as far as he could, whatever damage his labors might have caused to the servient tenement." *Ib.* p. 235. The decision of this court, in the case of the present plaintiff against White, already referred to, (21 Pick. 341,) seems to have recognized and adopted fully the principle, that where the use of a thing is granted, every

thing is granted essential to such use. Such a right carries with it the implied authority to do all that is necessary to secure the enjoyment of such easement.

There are other well settled legal principles, that have a bearing upon this question. The duty of making repairs, and the labor necessary for keeping the watercourse in a state fit for use, rests wholly upon him who claims an easement on his neighbor's land ; and, as a general rule, easements impose no obligation upon those, whose lands are thus placed in servitude, to do any thing. Gale & Whatley on Easements, 215. *Taylor v. Whitehead*, 2 Doug. 745. The owner of the land below, through which the stream passes, being thus free from all *obligation* to cleanse the stream, or remove any obstructions that may arise without fault on his part, and which may impede the free passage of the water ; if the right to cleanse such watercourse, or remove such obstructions, rests exclusively with him, the consequence will be, that the same may never be done ; and whether done or not, will depend upon the will or caprice of the owner of the land below, who may have no interest in the matter, rather than upon the wishes of the owner of the mill above, whose interests may be deeply affected by it.

We are satisfied that in the present case the owner of the mill privilege above, having this natural easement in the land below, would, independently of any right acquired by compact or by prescription, have a right to enter upon the land below, and in a reasonable and proper manner do all acts necessary to secure the enjoyment of his easement. This right to enter upon the land of another, to cleanse a natural stream, or remove any casual obstructions therein, is one doubtless to be held to the strictest and narrowest limits compatible with the enjoyment of the principal easement. It is to be considered as a privilege arising from the necessity of the case, and, like a way of necessity, to be enjoyed only when the party has no other reasonable and suitable mode of effecting this object. It is to be done in such a manner as shall cause no unnecessary damage to the owner of the land below. The incumbrance, occasioned by the easement in the present case, does not appear, by the evidence re-

lied upon to establish the nature and extent of it, to be other and different from the secondary easement embraced within the principles we have stated. Such being the case, it constituted no such incumbrance as will authorize an action by the plaintiff for the breach of covenant in the deed of Dudley.

This result renders it unnecessary to consider and settle the various questions raised as to the measure of damages.

Judgment for the defendant.

LEMUEL CAPEN, JR. *vs.* BENJAMIN F. EMERY.

Where one State court is abolished, and its jurisdiction is transferred to another court, the clerk and presiding judge of the latter court are competent to authenticate the records of the former in the manner prescribed by the act of congress of May 26th 1790, so as to make them admissible in evidence in the courts of another State. And where such clerk puts his attestation to a transcript of a judgment of the former court in another State, and annexes thereto the seal of the latter court, and the presiding judge of that court annexes thereto his certificate that such attestation is in due form, and that the former court is abolished, and its jurisdiction, records and proceedings transferred to the latter court — such certificate is *prima facie* evidence of the correctness and sufficiency of the attestation of such clerk, and makes the record, so authenticated, admissible in evidence in this State, under the Rev. Sta. c. 94, § 57.

DEBT on a judgment of the court of common pleas held in the county of Kennebec, in the State of Maine, on the first Tuesday of April 1838.

At the trial, in the court of common pleas in this county, at the October term, 1841, the only question was, whether the record of the judgment declared on was so authenticated as to be admissible in evidence.

A copy of the judgment recited in the plaintiff's declaration was certified by S. A. Kingsbury, "clerk of the judicial courts for the county of Kennebec," and "the seal of the district court for the middle district" was annexed thereto. Appended to this copy, so certified, was a certificate, under the signature of the governor and the seal of the State of Maine, that said Kingsbury, whose signature was attached to said copy, was "clerk of all the judicial courts within and for the county of Kennebec."

July nominated, appointed, commissioned and qualified." The following certificate also accompanied the aforesaid copy of said judgment: "L. S. State of Maine. I, Asa Redington, sole judge of the district court for the middle district in said State, do certify, that Sanford A. Kingsbury, Esq. whose name is affixed to the within certificate, is clerk of all the judicial courts held within and for said county of Kennebec, in said middle district, and that his attestation to the within copy of record is in due form. I further certify, that the court of common pleas, named in said copy, has been abolished by law, and the said district court established in its stead, to which the records, proceedings and jurisdiction of said court of common pleas are transferred. In testimony whereof, I have hereunto set my hand, and caused the seal of said district court for the middle district to be hereunto affixed this 22d day of October, A. D. 1841."

The defendant objected to the competency and sufficiency of this evidence, and the court ruled that it was insufficient, and directed the jury to return a verdict for the defendant, which they returned accordingly. The plaintiff thereupon alleged and filed exceptions to said ruling and direction.

Lutnam, for the plaintiff, cited *Thomas v. Tanner*, 6 Monr. 52. *Ripple v. Ripple*, 1 Rawle, 389. *Snell v. Faussatt*, and *U. States v. Johns*, 1 Wash. C. C. 274, 369. *Church v. Hubbard*, 2 Cranch, 238. 1 Stark. Ev. 154, 252, and notes. Greenl. on Ev. §§ 505, 506.

No counsel appeared for the defendant.

DEWEY, J. To entitle the records of judicial proceedings in one State to be given in evidence in another, under the act of congress of May 26th 1790, they must have "the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, as the case may be, that the said attestation is in due form." Further provision is made by our Rev. Sts. c. 94, § 57, in these words: "The records and judicial proceedings of any court of another State, or of the United States, shall be admissible in evidence in all cases in this State,

when authenticated by the attestation of the clerk, prothonotary, or other officer having charge of the records of such court, with the seal of such court annexed." Upon inspection of the records here offered, the only grounds of objection seem to be, that the judgment was rendered by the court of common pleas of the State of Maine, but the certificate of the judge, that the attestation is in due form, purports to be a certificate from him as judge of the district court for the middle district in said State of Maine, and the seal accompanying both the certificate of the judge and that of the clerk purports to be the seal of the district court of the middle district.

The law undoubtedly contemplates that the certificates should be from the judge and clerk of the same court in which the judgment was rendered, if such court exists. The evidence offered is apparently objectionable for variance in this particular, unless the explanatory certificate of the judge is competent evidence. If, however, we may give effect to that portion of the certificate, the objection is wholly removed; as the judge certifies that "the court of common pleas, named in said copy, has been abolished, and the said district court established in its stead, to which the records, proceedings and jurisdiction of said court of common pleas are transferred." There can be no doubt but that in case of such transfer of jurisdiction, the judge of the substituted court, and the clerk to whom the records are transferred, are the proper certifying officers. Greenl. on Ev. § 506. *Thomas v. Tanner*, 6 Monr. 52. The only question is, whether the abolition of the old court, and the transfer of jurisdiction to the new, must be shown by the statute itself.

It seems to us, that the certificate of the judge, showing the transfer of the jurisdiction of the court of common pleas, and accounting for the change in the name of the court, and its change of seal, is good *primâ facie* evidence of the correctness and sufficiency of the general certificate of the clerk.

New trial granted.

THOMAS G. ATKINS vs. THE BOYLSTON FIRE AND MARINE INSURANCE COMPANY.

A policy of insurance on goods to be shipped between two certain days does not cover goods shipped on either of those days.

ASSUMPSIT on a policy of insurance, dated February 7th 1840, by which the defendants caused the plaintiff to be insured \$15,000 on coffee, the produce of the plaintiff's estate, on board any vessel or vessels at and from Matanzas to Boston, "to be shipped between February 1st and July 15th 1840," said coffee being "valued at \$12.50 per 100 Spanish pounds on board, including premium." The declaration averred a loss, by the perils of the sea, of 90 bags of such coffee laden on board the brig Emery, by the plaintiff, between the days aforesaid.

The case was submitted to the court on an agreed statement of facts, of which only the following are material: The policy declared on was made at the time and in the terms stated in the plaintiff's declaration. By another policy, dated July 14th 1840, the defendants caused the plaintiff to be insured \$4000 on coffee on board any vessel or vessels at and from Matanzas to Boston, "to be shipped subsequently to July 14th 1840, and prior to October 15th 1840: All shipments made subsequently to July 20th to be valued at \$12.50 per 100 Spanish pounds." Ninety bags of coffee, belonging to the plaintiff, and weighing 14,980 pounds, were shipped on board the brig Emery, at Matanzas, on the 15th of July 1840, and were lost by the perils of the sea while said brig was pursuing her voyage to Boston. The invoice price of said coffee was \$1381.07½.

On these facts, the only question between the parties was, whether the lost coffee was insured by the valued policy declared on, or by the subsequent policy of July 14th, which was not valued. If it was insured by the latter, the defendants claimed a right to be discharged by a payment which they had made to the plaintiff for the coffee at the invoice price, under an agreement that neither party should be prejudiced by such payment.

Atkins v. Boylston Fire and Marine Ins. Co.

Crowninshield, for the plaintiff.

Cooke, for the defendants.

WILDE, J.* Upon the facts agreed, the question is, whether the property lost was covered by the policy declared on.

The cases cited as to the computation of time have but little bearing on the present question. Those are cases where a contract was to be performed, or an act to be done, within a limited time after a day certain. In such cases, the general rule is, that the day from which the computation is to be made is to be excluded in the computation, unless it appears that a different computation was intended; and this rule applies to cases where the computation is to be made from and after an act done on a particular day; for a day, as was said in *Pugh v. Duke of Leeds*, Cowp. 720, is to be considered in law as an indivisible point of time, and there can be no distinction between a computation from an act done, and a computation from the day in which the act was done. If by this policy, therefore, the plaintiff's goods had been insured for five months from the first day of February, that day would have been excluded and the first day of July would be included. But the language of the present policy is different and is peculiar; it being usual, in policies on time, not only to specify the day, but also the hour, when the risk is to commence. It was not so done in the present case, and the construction of the first policy, if no regard is to be had to the second policy, as explanatory of the intention of the parties as to the first, seems to depend wholly on the true meaning of the word "between." This preposition, like many other words, has various meanings; and the question is, in what sense was it used in the present policy? The most common use of the word is to denote an intermediate space of time or place, and the defendants' counsel contends that it was so used in the present policy, and that the first day of February and the first day of July are to be both excluded. On the other hand, the plaintiff's counsel insists that both days are to be included; at least I so understood the argument. And we

* The chief justice did not sit in this case.

think it clear that both days must be included or excluded ; for there is nothing in the contract manifesting the intention of the parties to include or exclude one day rather than the other.

It is undoubtedly true that the word "between" is not always used to denote an intermediate space of time or place—as the plaintiff's counsel remarked. We speak of a battle between two armies, a combat, a controversy, or a suit at law between two or more parties ; but the word thus used refers to the actions of the parties, and does not denote locality or time. But if it should be said that there was a combat between two persons between two buildings, the latter word would undoubtedly refer to the intermediate space between the buildings, while the former word would denote the action of the parties. But it was argued, that the word "between" is not always used as exclusive of the termini, when it refers to locality. Thus we speak of a road between one town and another, although the road extends from the centre of one town to the other ; and this, in common parlance, is a description sufficiently intelligible, although the road in fact penetrates each town. But if all the land between two buildings or between two other lots of land be granted, then certainly only the intermediate land between the two lots of land, or the two buildings, would pass by the grant. And we think the word "between" has the same meaning when it refers to a period of time from one day, month or year, to another. If this policy had insured the plaintiff's property to be shipped between February and the next July, it would clearly not cover any property shipped in either of those months. So we think the days mentioned in the policy are excluded. We think the word "between" has the same meaning in this respect, as the words used in the second policy. In that policy, the goods insured are to be shipped subsequently to the 14th of July, and prior to the 15th of October next following. This would be construing the contract according to the most common meaning of the word "between." And there is nothing in the contract to intimate that the word was used in any other sense.

But if the language of the first policy were doubtful, the doubt, we think, would be removed by the terms of the second,

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which must be presumed to have been intended by the parties to take effect immediately after the expiration of the first policy. Without, however, relying on this presumption, we are well satisfied that the goods in question, having been shipped after the 14th day of July, were not covered by the first policy.

Plaintiff nonsuit.

JOSEPH W. FOSTER vs. EDWARD C. PURDY.

Where a debtor deposits notes with his creditor, as collateral security, to be collected and accounted for, or to be returned within a specified time, and the creditor thereupon covenants or promises not to sue the debtor until the securities shall be given up; such covenant or promise is not a bar to a suit by the creditor, though brought before he has given up the securities.

WILDE, J. This was an action of assumpsit by the indorsee against the indorser of a promissory note, dated September 19th 1833, and payable in two years from the date. It was indorsed to Wellington, Foster & Co. in 1834, who continued to be the owners until 1841, when, for a valuable consideration, they sold it to the plaintiff. In the defence, it was proved that in March 1839, the defendant, being debtor to Wellington, Foster & Co. as indorser of said note, and on no other account, deposited with them certain securities, viz. notes and certificates of stock, to be collected or compounded by them, as they might think best, or to be returned by them to the defendant within two months, unless otherwise agreed thereafter. And Wellington, Foster & Co. thereupon gave the defendant a receipt for said securities, and annexed thereto the following engagement: "In consequence of the deposit of these securities, we hereby agree to withdraw any suit or suits commenced by us against the said E. C. Purdy, and not to renew or commence any suit against him, until said securities shall be returned." These securities were not returned to the defendant within two months; and it does not appear but that they are still in the hands of Wellington, Foster & Co.

The note having been overdue for many years, when it was

transferred to the plaintiff, it is admitted that he took it subject to any defence which might be set up, if the action had been brought by Wellington, Foster & Co. And the question is, whether, in such a case, to avoid circuity of action, their agreement might be pleaded in bar.

It is a well established rule of law, that a covenant not to sue an obligor, without any limitation of time, may be pleaded as a release, to avoid circuity of action. And the same rule applies, for the same reason, to a promise or agreement, not under seal, not to sue a note of hand or other contract which is likewise not under seal. It is equally well settled, that a covenant not to sue an obligor within a limited time cannot be so pleaded, but that the obligor's only remedy is upon his covenant, if he should be sued by the covenantor within the time limited. *Bac. Ab. Release, A. 2. 2 Saund. 48, note (1). Gauden v. Draper, 2 Vent. 217. Johnson v. Daverne, 19 Johns. 134. Scriba v. Deanes, 1 Brock. 173.* It is not material whether the limitation be for a longer or shorter time, or whether it be for a time certain, or is to depend on a contingency, although the contingency may depend on an act to be done by the covenantor or promisor.

In *Aylloffe v. Scrimshire, Carth. 63*, the obligee covenanted with the obligor not to put his bond in suit during 99 years. And it was held that the covenant could not be pleaded in bar to a suit on the bond. But it was admitted that if a stipulation had been superadded, that the bond, if sued within the time limited, should be forfeited, such a covenant and stipulation might be pleaded in bar to an action on the bond brought within the period of limitation. And the reason is, because the damages to be recovered for a breach of the covenant, and the damages recovered in the action on the bond, would be commensurate. *8 Pick. 231.* So in *Burgh v. Preston, 8 T. R. 483*, there was a memorandum annexed to the bond sued, that the obligee had agreed not to bring any action thereon, or assign the same, until after the death of the obligor; and it was held that such an agreement, made before the execution of the bond, and annexed thereto, might be pleaded to an action on the bond against the obligor, because the memorandum was to be considered as

part of the condition. But it appears clearly, from the remarks of Lord Kenyon, that if the agreement had been collateral, in a different deed, the decision would have been otherwise. So in *Hoffman v. Brown*, 1 Halst. 429, the obligee had covenanted not to sue the obligor on his bond until the death of a minor, or his arrival at the age of 21 years ; and it was decided that the covenant could not be pleaded in bar of an action on the bond brought during the life of the minor and before his arrival at full age. In *Winans v. Huston*, 6 Wend. 475, it is said that the reason why a covenant not to sue for a demand within a limited time is not allowed to be pleaded in bar of an action brought contrary to the covenant, is to be ascribed to that principle of law, that if the right of action is once suspended by the act of the party, it is wholly gone. But the more satisfactory reason seems to be, that the damages to be recovered for the breach of a covenant or agreement not to sue for a demand within a limited time may be much less than the demand ; and if so, it would be unjust to allow it to bar the whole demand ; and thus it is distinguished from a perpetual covenant, which is held to be a bar, to avoid circuity of action, as the damages, if cross actions were to be brought, would be the same.

A similar distinction is recognized in respect to mutual covenants in the same deed. Where the mutual covenants go to the whole consideration on both sides, they are dependent covenants ; and if either party be sued by the other, the plaintiff must aver performance of the covenant on his part, or an offer to perform it ; and this averment is traversable, and if not proved, the action cannot be maintained. But where a covenant goes only to part of the consideration on both sides, it is an independent covenant, and no such averment is necessary ; because the damages sustained by the parties would be unequal. 1 Saund. 320, note (4) and the cases there cited. Considering this rule of law as well founded and well settled, we are of opinion that the agreement of Wellington, Foster & Co. is no bar to the present action.

It has been argued by the defendant's counsel, that Wellington, Foster & Co. were bound to collect or return to the defend-

ant the securities pledged, within two months ; and that as they have not so done, the defendant is not now under any obligation to receive them, and consequently that their agreement is to be considered as equivalent to an agreement never to sue the note referred to. But if it were admitted that the defendant is not bound to receive these notes and certificates, his conclusion does not follow ; because unquestionably he may sue for the breach of the agreement, and may recover damages therefor ; and thus the said agreement may be extinguished. And if it were otherwise, the agreement could not be pleaded in bar of this action, because the damages, which the defendant would be entitled to recover for the breach of the agreement, might be more or less than the amount due on the note in suit. Wellington, Foster & Co. would be liable in damages only for the value of the securities received, if they had not been able to collect them ; which probably would be less than the amount due on the note in suit ; and if so, it would not be just that the plaintiff should be precluded from the recovery of the balance. On the other hand, if the securities received were good, the defendant would be entitled to recover the full amount due on them, which would much exceed the amount due on the note in suit. The rule, therefore, founded on equality of damages in cases of perpetual covenants, is not applicable. In no view, therefore, can the said agreement be considered as a release or defeasance of the note in suit.

As to the other ground of defence, viz. that the agreement may be so construed as to sustain a plea of accord and satisfaction, we are very clear that it cannot be so construed. The notes and certificates were received, unquestionably, as collateral security, and not in satisfaction of the note in suit.

Judgment for the plaintiff

Wellington, for the plaintiff.

G. T. Bigelow, for the defendant.

JOHN HANCOCK & others vs. PHILIP WENTWORTH.

An easement in land of a right of passage way to certain buildings is extinguished by the laying out and construction of a highway over the site of such buildings.

It is no objection to a recovery in a real action, that a highway has been laid out over the demanded premises or a part thereof; nor that the tenant has an easement in the demanded premises.

Where several tenants in common of land join as demandants in a writ of entry, and one of them dies pending the suit, and his share of the land descends to another demandant, the latter may amend the writ so as to claim therein his enlarged share of the demanded premises.

WRIT of entry to recover a small parcel of land in Boston, bounded northeasterly on land over which Blackstone Street has recently been laid out and established. The demandants counted on their own seizin within thirty years, and claimed as tenants in common in different proportions, as heirs of the late Governor Hancock. Thomas Hancock, one of the demandants, died intestate, after the action was commenced, leaving John Hancock, another of the demandants, his sole heir at law, who claimed a right to proceed in the suit for his proportion of the demanded premises, as enlarged by descent from said Thomas.

The writ was dated December 31st 1839. Plea nul disseizin, with the following (among other) specifications of defence; viz. that the tenant has had uninterrupted, exclusive and adverse possession of the demanded premises, and a good title thereto, more than 50 years next preceding the date of the writ; that the demandants, and those under whom they claim, have had no seizin of the demanded premises within 50 years; and that on or about the 1st of August 1833, the city of Boston, by their mayor and aldermen, legally laid out and opened a highway or street, called Blackstone Street, over a part of the demanded premises, and that said street is still open and continued.

The trial was before the chief justice, who made a report of the case, in substance as follows: The demandants introduced evidence that Governor Hancock, in 1785, owned a considerable tract of land adjoining the old Mill Creek, of which the demanded premises were then parcel, and that he, on the 24th of

August in that year, conveyed to the tenant, in fee, a house and yard adjoining, in two parcels precisely described and bounded, but not including the demanded premises, with the right of a passage way over other lands of the grantor, and "also the privilege in common to the privy or privies on the Mill Creek adjoining Mr. Stickney's barn house on said creek." It appeared that the tenement, thus conveyed to the tenant, was one of several similar tenements, called Hancock's Row ; that there was, in the rear of said tenements, and lying between them and Mill Creek, an open piece of land, being part of the tract owned by Governor Hancock, across which open piece access was had, from the tenant's tenement and three other tenements, to the said outhouses on the margin of the creek. This piece of land, then open, constitutes the demanded premises.

It further appeared, that in 1832 the mayor and aldermen of Boston, being duly authorized, caused the Mill Creek (which was a broad and deep watercourse flowed by the tide) to be filled up, and caused the site thereof, together with a portion of the land adjoining on the southerly side, including part of the demanded premises, to be laid out as a public highway, called Blackstone Street.

There was evidence tending to show, that in the year 1820 or 1821, a ten foot building was erected on the premises, covering the rear thereof next to the creek, and coming up towards the front ; that said building was inclosed by a fence ; that the building and yard were occupied ; and that the building and fence were erected by the defendant, or by him with others, and that he claimed an interest in the building, and received rent for it.

It also appeared that some of the demandants peaceably entered upon the demanded premises, before the commencement of this action, and there claimed title and exercised some formal act of ownership.

The jury were instructed, that if a seizin of the demanded premises was proved to be in Governor Hancock in the year 1785, that seizin would be presumed to continue till his death ; and that unless an alienation or disseizin were proved, he would

be presumed to die seized, and the estate, subject to the easement upon it, to descend to his heirs : That by the deed from him to the tenant, the latter acquired no title to the demanded premises, but only to an easement, by necessary implication, of a right of passage way over the premises, to and from the out houses on Mill Creek : That the use of the land in question, so far as it was necessary or convenient to enable the tenant, or those occupying his estate, to have the benefit of the easement, was not adverse to the title of the owner, and would not tend to show a disseizin : That by the filling up of the creek and converting the site of it, together with a part of the land on the southerly side of it, embracing the entire site of said outhouses, the easement was extinguished, and that, consequently, the right of way to them, by implication, over the demanded premises, was extinguished and no longer existed : But that whether such easement were extinguished, or not, was immaterial to the issue, because the right of soil, demanded in this action, was not inconsistent with the tenant's easement, if it still continued ; and that the demandants, if otherwise entitled, would have a right to recover in this action, notwithstanding such easement : That it is no objection to the demandants' right to recover the demanded premises, that a part of the same is now covered by a public highway ; such highway constituting a mere public easement, not inconsistent with the seizin in fee put in issue in this action : That whether the act of erecting a building on the demanded premises, and inclosing them, in 1820 or 1821, was done by the tenant, or by him and others, or whether it amounted to a disseizin of the heirs of Governor Hancock, or not, was immaterial, if, as appeared by uncontradicted evidence, the demandants, or some of them, entered before the commencement of this action ; as such entry purged the disseizin, if there were any, and entitled them to bring the action on their own seizin.

The jury were further instructed, that if they should find a verdict for the demandants, they might find a general verdict for such proportion of the demanded premises as the aggregate of their respective shares would amount to — the writ not including, as demandants, all the heirs of Governor Hancock.

The jury were also instructed, that it was unnecessary to specify, in their verdict, (if they should find for the demandants,) whether the premises were subject to an easement in favor of the tenant, or not ; on the ground that such easement was not in issue, in this action, and would not be affected by the judgment.

The jury found " that the tenant did disseize the demandants of 133-180ths of the demanded premises, in manner and form," &c.

" If, in the opinion of the whole court, the proportion of each demandant should have been specified in the verdict, or that the easement is not extinguished, and that it ought to have been specified, the verdict may be amended, and the judgment entered accordingly, as the court may order. And on the whole case stated, the verdict is subject to the opinion of the whole court, upon all questions of law arising thereon."

S. D. Parker, for the tenant.

Hancock, for the demandants.

HUBBARD, J. A question was made on the trial of the issue in this case, whether the tenant had acquired a title to the demanded premises by disseizin ; but as the jury have found a verdict for the demandants on this point, under the ruling of the court, the correctness of which is not denied, the only subject of inquiry which remains is, whether the tenant can successfully defend against the present action by force of the easement originally granted to him in the demanded premises.

The argument of the counsel for the tenant is substantially this ; that it is a controversy as to the reversion of the land which is now demanded, and therefore, while the right to the easement exists, the demandants cannot oust the tenant from his possession of the premises : That in the grant to him, the right was not severed, and a particular privilege given to each estate in the row of tenements, of which the tenant's was one ; but that it was an easement granted over the whole land, to enjoy a privilege in each of the outhouses upon it ; and that, as it appears by the facts in this case that the easement is only suspended, the demandants cannot enter and disturb the possession

of the tenant : That here has been no act done by either party, by which the right is extinguished ; that there is no evidence of the tenant's intention to relinquish his right, and no non-user for twenty years ; and that if the city were to discontinue Blackstone Street, which was laid out against the will of the tenant, his rights, so far as they are now impaired, would be restored.

But to this argument of the tenant against sustaining the present action, however plausible it may appear to him, there are substantial objections. And first, the right of the demandants to the fee in the demanded premises, and the right of the tenant to an easement in them, are rights independent of each other, and may well subsist together. A man cannot have an easement in his own estate, except only in a few cases where it may be suspended, when he holds the estate in different capacities and under distinct titles, one of which consists of an easement. But where a man acquires an estate, by an indefeasible title, in which he had previously an easement, the easement is merged in the fee and cannot be revived. But no question arises here in regard to the easement. A recovery therefore by the demandants will not affect or disturb the easement of the tenant (if he has one) in the premises ; while a recovery is necessary to protect the demandants' rights, which otherwise, in the situation in which the estate now is, may be lost by disseizin. And it is no objection to a recovery in a real action, that the demanded premises or a part of them have been laid out as a common highway ; for such laying out is but the creation of an easement, and does not affect the title to the fee of the estate. Notwithstanding therefore the tenant may have an easement in the demanded premises, the demandants have a perfect right to maintain this action, as they would have also, supposing the estate remained in the same situation in which it was when the original grant was made, or had been restored to that situation.

But we are further of opinion, that the easement claimed in this case by the tenant, to pass over the land to the outhouses which stood on the mill creek, is not merely suspended, but is extinguished. It is said in *Bac. Ab.* Extinguishment, that

“where a right, title or interest is destroyed or taken away by the act of God, operation of law, or act of the party, this in many books is called an extinguishment.” Co. Lit. 147 b. 1 Rol. Ab. 934, 935. So an easement is one of those rights which may be extinguished or destroyed. In this case it is taken away by act of the law. The constituted authorities of the city, being duly empowered, had a right, if the safety and convenience of the citizens required it, to lay out and open Blackstone Street ; and the proprietors of those estates, which were taken for that purpose, had their claim on the city for the injuries sustained by them ; and the tenant among the number. If his easement was disturbed or destroyed, he was as well entitled to remuneration, in proportion to the injury sustained, as the owner of the land.

But it cannot be maintained, in a case like the present, (where the mill pond is converted into land and covered with tenements, the mill creek filled up, and in fact abated as a nuisance, and a new street made, covering part of the demanded premises, and bordered with houses,) that the tenant's easement is only suspended. It is destroyed by the act of the law ; and in every practical and legal view of the matter, it cannot be revived. And if the tenant has not forfeited his remedy by lapse of time, his claim, for aught which now appears, may be good against the city, for the damages he has sustained ; and this claim cannot be affected by the recovery of the demandants against him in the present action.

We think, upon the facts as proved or admitted, that the demandants have established their claim and are entitled to judgment on the verdict.

It appeared on the trial of the case, that Thomas Hancock, one of the demandants, had died intestate and without issue, and that John Hancock, another of the demandants, is his sole heir at law. We think, the fact being stated on the record, the writ may be amended, and John Hancock be allowed to claim for his enlarged share.

MOSES CLARK vs. ALBERT BAKER.

A. purchased of B. a cargo of yellow and white corn on board B.'s schooner, the quantity not being known, and agreed to pay one sum per bushel for the yellow and another sum per bushel for the white; B. warranting it to be of a certain quality: A. paid B. \$1200, "on account of corn per schooner." The schooner was hauled to A.'s wharf, and he took therefrom and put into his warehouse a part of the corn, and then refused to receive any more, because the residue was not such as B. had warranted it to be, and immediately gave notice to B. that he would receive no more of the cargo, and requested B. to take the schooner away: The corn thus taken by A. amounted, at the agreed price per bushel, to \$1067; and A. sued B., in an action for money had and received, to recover back the difference between that sum and \$1200. *Held*, that the contract was entire, and that the action could not be maintained; that A. might have rescinded the contract by returning all the corn, and then have maintained an action to recover back the money advanced; or might have maintained an action on the warranty.

ASSUMPSIT for money had and received. At the trial in the court of common pleas, before *Warren*, J. evidence was introduced, which tended to prove the following facts:

On the 21st of September 1841, the defendant was owner of the schooner *Shylock*, then lying in Boston, and of a cargo of corn on board of said schooner, and the plaintiff purchased the said cargo of the defendant, agreeing to pay 76½ cents per bushel for the yellow corn, and 73½ cents for the white corn; the defendant warranting it to be of a certain quality. The quantity of corn was not known at that time, but it afterwards appeared that there were between 2000 and 3000 bushels. The plaintiff paid the defendant \$1200 "on account of corn per schooner *Shylock*." The schooner was hauled to the plaintiff's wharf, and he began to discharge the cargo and place it in his store. He received enough thereof (about 1400 bushels) to amount, at the agreed price, to \$1067.02, and refused to receive any more, on the ground that the corn which remained in the schooner, and which he refused to receive, was not such as the defendant warranted the cargo to be, but was of an inferior quality. He immediately gave notice to the defendant of his objection to receiving any more of the cargo, and requested the defendant to haul the schooner from the plaintiff's wharf.

This action was brought to recover the difference between the aforesaid sums of \$1200 and \$1067.02.

The defendant objected that this was an entire contract, and that the present action could not be maintained, without proof that the plaintiff offered to return the corn which he had accepted and received into his store. The judge overruled this objection.

After much evidence had been introduced on the question whether the corn, which the plaintiff refused to receive, was or was not such as the defendant was bound to deliver, by the terms of his warranty, the judge instructed the jury, that if they were satisfied that the foregoing facts were proved, and that the plaintiff had taken from the schooner all the corn which was of a quality to satisfy the terms of the warranty, they should return a verdict for the plaintiff. Such verdict was returned, and the plaintiff alleged exceptions to the said ruling and instruction of the judge.

C. T. Russell, for the defendant. As the whole cargo was actually delivered to the plaintiff, there was an executed contract, and a complete and perfect sale. *Macomber v. Parker*, 13 Pick. 175. *Riddle v. Varnum*, 20 Pick. 280. It was intended that the property in the corn should vest in the plaintiff, before it was measured; as is shown by the payment of the \$1200. And where there is no intention of severance, delivery of part is a delivery of the whole. *Damon v. Osborn*, 1 Pick. 476. *Stubey v. Heyward*, 2 H. B. 504. *Parks v. Hall*, 2 Pick. 213. If the property in the whole cargo did not vest in the plaintiff, yet there was a valid contract of sale of the whole.

The contract was entire, and not legally capable of severance. *Waddington v. Oliver*, 2 New Rep. 61. *Walker v. Dixon*, 2 Stark. R. 281. These two cases were cited, and not overruled, in *Shipton v. Casson*, 5 Barn. & Cres. 378, and *Oxen-dale v. Wetherell*, 9 Barn. & Cres. 386, where it was only decided that if one party elects to sever, the other may do the same. *S. P. Mavor v. Pyne*, 3 Bing. 285. *Bowker v. Hoyt*, 18 Pick. 557. So, in the case at bar, if there had been no payment, and the plaintiff had refused to receive all the corn, the defendant might have sued for the whole, or have elected, on the plaintiff's refusal to return what he had received, to sue

for that which he retained. But the defendant refused to give up the contract ; so that the cases in 5 and 9 Barn. & Cres. are not applicable.

The contract being entire, the plaintiff cannot maintain this action, as he did not return nor offer to return that part of the corn which he had received. Such contract must be rescinded *in toto*, or ratified. *Kimball v. Cunningham*, 4 Mass. 505. *Conner v. Henderson*, 15 Mass. 319. *Miner v. Bradley*, 22 Pick. 457. *Perley v. Balch*, 23 Pick. 286. *Coolidge v. Brigham*, 1 Met. 547. *Jenkins v. Simpson*, 2 Shepley, 364. *Hunt v. Silk*, 5 East, 449. *Giles v. Edwards*, 7 T. R. 181. *Thornton v. Wynn*, 12 Wheat. 183. *Pulsifer v. Hotchkiss*, 12 Connect. 240. *Ayers v. Hewett*, 1 Appleton, 281. *Leggett v. Cooper*, 2 Stark. R. 103. *Burton v. Stewart*, 3 Wend. 236. *Voorhees v. Earl*, 2 Hill's (N. Y.) Rep. 288. *Stevens v. Cushing*, 1 N. Hamp. 17. 2 Kent Com. (3d ed.) 480. Long on Sales, (Rand's ed.) 242-245.

In *Harrington v. Stratton*, 22 Pick. 510, it was held that the bad quality of an article might be shown, in reduction of damages on a note given for the price thereof, to save the necessity of a cross action. That reason does not apply in this case, where the party, who alleges the defect, is himself plaintiff. The rule adopted in that case is applicable to cases where a defendant is sued for the price of goods, or for work performed ; Chit. Con. (5th Amer. ed.) 743 ; and the case merely decides that the party, as defendant, shall have the same remedies by set-off, that he might have by action, as plaintiff. See 22 Pick. 460.

Money paid in part fulfilment of a valid agreement cannot be recovered back, unless the agreement has been rescinded by mutual consent, or the plaintiff has a right to rescind it by reason of the defendant's failure to perform it on his part. *Appleton v. Chase*, 1 Appleton, 74. *Smith v. Haynes*, 9 Greenl. 128.

Where there is a warranty, on the sale of goods, without fraud, and no stipulation that the goods may be returned, the vendee cannot annul the contract. 4 Mass. 12 Wheat. and 2 Hill, *ubi sup.* *Street v. Blay*, 2 Barn. & Adolph. 456.

G. T. Curtis, for the plaintiff. The entirety of a contract of sale depends upon two things : Either, 1st, the consideration must be entire, so that one part of it cannot be applied to one part of the object for which it was given, and the other to an other part ; or, 2d, the thing or things purchased must be incapable of separation, so as to admit a distinct apportionment of the consideration paid or agreed.

The contract now in question was not entire as to the whole of the corn. There were two kinds of corn, two different articles, at different prices. Where two articles are sold in one instrument of conveyance, but upon distinct considerations, and the title to one fails, an action for money had and received will lie to recover that portion of the purchase money which belongs, by the valuation in the contract, to that article. *Johnson v. Johnson*, 3 Bos. & Pul. 162. This doctrine is recognized in *Miner v. Bradley*, 22 Pick. 460 ; and analogous principles were applied in *Perkins v. Hart*, 11 Wheat. 237, and *Parish v. Stone*, 14 Pick. 198. See also *Planche v. Colburn*. 5 Car. & P. 58, and 8 Bing. 14.

There were not only two kinds of corn, at different prices, but there was a separate price for each bushel. A contract to buy a cargo of corn, of unknown quantity, with a warranty, at a certain price per bushel, is a contract to buy the separate bushels, and to give for each the stipulated price, provided each answers the warranty. See *Emmerson v. Heelis*, 2 Taunt. 38. If the cargo were bought for a gross sum, connected with the warranty, then, if part of it did not correspond to the warranty, the contract would be incapable of severance. Otherwise, where each smaller portion of the cargo is bought for a fixed sum.

The consideration was not entire, on the part of the vendor, either as to the whole cargo, or the two kinds of corn. If the title to one of the kinds had failed, the plaintiff might have retained the other. 3 Bos. & Pul. *ubi sup.* The case does not find that the sale of one of the kinds of corn was an inducement to the sale of the other.

It is a question to be determined on the whole transaction.

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whether the parties intend an entire contract, when several articles, of separate price, are sold in one bill of parcels. *Baldehy v. Parker*, 2 Barn. & Cres. 37. *Price v. Leu*, 1 Barn. & Cres. 156. Did these parties intend that if a single bushel of the corn should not conform to the warranty, the defendant might defeat the whole contract?

The contract in question, taking all its terms together, was a *conditional* contract, of different parts or subjects. No particular words are necessary to express a condition in a contract of sale. If something is to be done before the property is to vest, it is a conditional sale, to become absolute when the thing is done. *Dresser Manuf. Co. v. Waterston*, 3 Met. 17. The warranty, in this case, and the price affixed to each bushel of the different kinds of corn, operated as a condition that the defendant should not be held to take any part of the cargo that should not be of the quality warranted. The bad corn, therefore, was never the subject of the contract; the good corn being the only subject of sale. There were, in fact, several contracts. And when the condition failed as to one portion of the corn, the contract, as to that, was at an end; and the defendant holds the plaintiff's money against conscience and without consideration. *Towers v. Barrett*, 1 T. R. 133. Long on Sales, (Rand's ed.) 239.

The rule, that when a contract is rescinded, each party must be put *in statu quo*, is applied only to *absolute* contracts concerning an indivisible subject matter, or to contracts where the sale of one part is the inducement to the sale of the other. 2 Hill's (N. Y.) Rep. 293. The principle of the rule is, that the rights of neither party shall be injuriously affected by the rescinding of a contract. *Hunt v. Silk*, 5 East, 452. No right of the defendant is injured here. He has in possession an article which, in fact, he never contracted to sell to the plaintiff, and it is now worth as much to him as it was before he made the conditional sale. It is not a case of failure of consideration, but of want of consideration. See *Parish v. Stone*, 14 Pick. 210.

The case of *Giles v. Edwards*, 7 T. R. 181, cited for the

plaintiff, differs from that at bar. There the plaintiff was prevented from doing something he was bound to do, by the neglect of the defendant to do something that he was himself to do. For this reason, it was held that the plaintiff had a right to put an end to the whole contract, and to recover back his money. The question did not arise, whether if, as to a part of the subject of sale, both parties had completed the bargain, it would not have been severed.

HUBBARD, J. This case has been ably argued, and the authorities well examined ; and the only difficulty is in the proper application of well settled principles of law to the facts presented for our consideration. The plaintiff contends that there was not an entire contract ; and if he is right in this position, his conclusions will follow, and the action may be maintained. His ground is this ; that as the consideration paid by him can be settled by the amount of corn delivered, and as the articles, which were the subject of the contract, were capable of severance and apportionment, the contract is not entire ; that there were two kinds of corn, differing in price, and each bushel separately priced ; that it was an agreement to buy an unknown quantity at a given price, if each bushel of corn should answer the warranty ; and that it was a sale of so much corn as corresponded with the warranty, and no further — a provisional, not an absolute contract — a provisional contract of different parts and subjects, and became absolute only so far as it was complied with. And the scope of the argument is this ; that where the subject of the contract is indivisible in its nature, or if consisting of more than one article, and the consideration given for the whole is agreed upon in such manner that it cannot be separated and apportioned upon the several articles, then, in either of such cases, where the party seeks to relieve himself from the contract, because the article or articles, or some of them, are different from or inferior to those he contracted for, he must first rescind the contract by a return of the articles received, or by a tender of the same, before he can sustain an action to recover back the consideration paid. And the plaintiff admits that the decided cases sustain these positions ; but he maintains that the

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present case is not included within either of them, because the consideration paid by the vendee, and the things sold by the vendor, can be settled by the amount delivered ; there being, as he contends, not only two kinds of corn, varying in price, but also a separate contract for each distinct bushel. The plaintiff has cited, among other cases, those of *Johnson v. Johnson*, 3 Bos. & Pul. 162, and *Miner v. Bradley*, 22 Pick. 457, as sustaining the views taken by him. In the first of these, a man bargained for two pieces of land, one valued at £700, and the other at £300, which were conveyed to him in one deed, for the consideration of £1000 ; the same having been sold for the benefit of certain legatees, and the proceeds divided amongst them. The title of one of the pieces proved defective, and he was evicted. He then brought an action for money had and received against one of the legatees, for his share of the purchase money of said piece. It was objected against the action, among other things, that the contract was entire, and that he could not recover without reconveying, or offering to reconvey, the other parcel ; that the contract could not be rescinded in part and be considered as still subsisting for the remainder. The court were at first inclined to treat the case as a proper subject of inquiry in a court of equity, and they said, "if the question were, how far the particular part, of which the title failed, formed an essential ingredient of the bargain, the grossest injustice would ensue, if a party were suffered in a court of law to say that he would retain all of which the title was good, and recover a proportionable part of the purchase money for the rest. Possibly the part which he retains might not have been sold, unless the other part had been taken at the same time ; and ought not to be valued in proportion to its extent, but according to the various circumstances connected with it. In this case, however, no such question arises ; for although both pieces of ground were bargained for at the same time, we must consider the bargain as consisting of two distinct contracts ; and that the one part was sold for £300, and the other for £700. It has not been suggested that they were necessary to the occupation of each other." It is obvious, therefore, that this case was not decided on the ground

that the consideration money can be apportioned, where the contract is entire ; but that the pieces of land, bargained for and included in one deed, were the subjects of two distinct and independent contracts.

The facts in the case of *Miner v. Bradley* were shortly these : The plaintiff bought at auction a cow, and 400 pounds of hay which was in a bay with other hay, for the gross sum of \$17, which he paid for at the time, and took the cow. He afterwards demanded the hay, and the defendant refused to deliver it. The plaintiff then brought an action for money had and received, to recover back the price of the hay. But the court ruled, that the action could not be maintained, because the plaintiff had not rescinded the contract by returning the cow ; and they held that his only remedy was upon the special contract, for damages for the conversion of the hay. And the learned judge, who gave the opinion, went on to say — and upon this the plaintiff's counsel specially relies — “there may be cases where a legal contract of sale, covering several articles, may be severed, so that the purchaser may hold some of the articles purchased, and, not receiving others, may recover back the price paid for them. Where a number of articles are bought at the same time, and a separate price agreed upon for each, although they are all included in one instrument of conveyance, yet the contract, for sufficient cause, may be rescinded as to part and the price paid recovered back, and may be enforced as to the residue.” It is, however, added to this — and which qualifies the whole proposition — “but this cannot properly be said to be an exception to the rule ; because in effect there is a separate contract for each separate article.” And the judge then cited the case last mentioned (*Johnson v. Johnson*) as well explaining the subject.

While we fully approve these cases and feel that they support the plaintiff's position, so far as relates to contracts for different articles, where the consideration is divisible, or to cases where two distinct contracts are embraced in one settlement ; still we think they neither go the length nor do they support the doctrine that the contract is not entire merely because the several articles are sold by weight or measure, and the value is ascertained by

the price affixed to each pound, or yard, or foot of the quantities contracted for. On the other hand, we believe the legal principle, governing in such cases, does not depend, either solely or necessarily, on the nature of the articles which are the subject of the contract, or on the prices affixed to each, but upon the nature of the contract itself. If the contract is entire, if it is one bargain, then it matters not whether there is one or are many articles — and though each may have an appropriate price. In the one case, the vendor might have been unwilling to sell one portion without selling the whole ; in another, the buyer might be unwilling to take a part unless he could have the whole.

The question then, in the present case, resolves itself into this : Was there one bargain for the whole cargo, or were there two distinct contracts for the yellow and white corn, or was there a separate and independent bargain for each bushel of corn contracted for, in consequence of which the receipt of one or more bushels of the warranted quality imposed no duty upon the plaintiff to retain the residue ? And we are of opinion that the contract was an entire one. The bargain was not for 2000 or 3000 bushels of corn, but it was for the cargo of the schooner *Shylock*, be the quantity more or less ; a cargo known to consist of two different kinds of corn ; and the means taken to ascertain the amount to be paid were in the usual mode, by agreeing on the rate per bushel for the two kinds, and to take the whole. The schooner was hauled to the wharf of the plaintiff, and the cargo put under his control, and with all the possession that could be given before it was unladed. No further act was to be done by the vendor. No measurement of quantity was to precede the delivery. For the whole quantity was delivered, whether more or less, and the measure was needed only to ascertain the amount of the respective kinds, and thus to fix the sum to be paid. And in pursuance of this contract, \$ 1200, on account of the entire cargo, was advanced to the defendant. No agreement was made that the party might reject, as it came from the vessel, such part as did not agree with the warranty, and pay only for what he actually retained ; but the bargain was for the whole cargo at an agreed rate per bushel. And although the plaintiff refused to

take the whole from the vessel, and in consequence the defendant was compelled, for the purpose of obtaining his vessel, either to receive a part back, or to unlade it himself for the plaintiff; yet in principle we consider the delivery the same to the plaintiff as though the whole had been unladed in bulk into his warehouse, and the measuring had taken place afterwards. There is no ground, on the evidence as reported, to maintain that there were two contracts for the distinct kinds of corn; for it does not appear but that the 1400 bushels, that were retained, consisted of a part of each. So that the plaintiff, to support his position, must contend, as he has contended, that the bargains in this case were separate bargains for each several bushel of a given quality, and for a distinct price. But this separation into parts so minute, of a contract of this nature, can never be admitted; for it might lead to the multiplication of suits indefinitely, in giving a distinct right of action for every distinct portion. As well might a man who sold a chest of tea by the pound, or a piece of cloth by the yard, or a piece of land by the foot or by the acre, contend that each pound, yard, foot or acre, was the subject of a distinct contract, and each the subject of a separate action. The cases of *Waddington v. Oliver*, 2 New Rep. 61; *Leggett v. Cooper*, 2 Stark. R. 103; *Oxendale v. Wetherell*, 9 Barn. & Cres. 386; *Baldevy v. Parker*, 2 Barn. & Cres. 37; *Shaw v. Badger*, 12 S. & R. 275; and *Bowker v. Hoyt*, 18 Pick. 555; support the view we take of this contract.

The plaintiff's redress was easy — either to rescind the contract by returning all the corn purchased and suing for the money advanced; or by action upon his warranty, for the injury sustained by the delivery of an article inferior to that warranted.

Without more particularly considering, at this time, one of the points of defence relied on, and for which cases have been cited, (2 Hill, 288, and 2 Barn. & Adolph. 456,) that where there is a warranty without fraud, and no stipulation that the goods may be returned, the party cannot rescind the contract; we think it sufficient to say, we are of opinion that the bargain between these parties was an entire contract for the purchase of the whole cargo, and that the plaintiff, not having rescinded it.

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cannot maintain the present action for the portion of money, advanced by him on the whole, which exceeded in amount the value of that portion of the cargo actually retained by him.

The exceptions are therefore sustained, and the verdict set aside. A new trial is ordered, to be had at the bar of this court.

PHILO S. SHELTON vs. FITZHENRY HOMER & others.

Where a testator, by his will, authorizes his executors to sell and convey his real estate which is not specifically devised, at such times as they shall think proper, and such sale is not required for the purpose of effecting any other provisions of the will, the executors have a mere naked power to sell, not coupled with a trust.

Where a testator by his will gives a naked power to his executors, or such of them as shall take upon themselves the probate of his will, to sell and convey his real estate, and appoints two executors, who accept the trust and cause the will to be proved, and one of them afterwards resigns his trust, as executor, and is discharged therefrom by a decree of the probate court, the other executor has no authority, by the will, to sell and convey the testator's real estate: But if he has such authority, yet if he makes a contract for the sale of such estate to the executor who has resigned, he being one of the testator's heirs and devisees, and also, by the testator's will, trustee for other heirs and devisees, the court will not enforce specific performance of the contract; contracts, by which a trustee becomes the purchaser of the trust estate, being contrary to the policy of the law.

BILL in equity for the specific performance of a contract.

The bill alleged, that Benjamin P. Homer, in April 1838, died seized of divers messuages, lands and tenements, most of which were specifically devised by his last will: That in and by said will, the testator authorized and empowered his executors, or such of them as should take upon themselves the probate of said will, to sell and convey, and to execute good and sufficient deed or deeds to convey, all or any of the real estate of said testator, except such as was in said will specifically devised, either by public auction or private contract, at the discretion of said executors, for the best price they could obtain, and at such times as they might think proper: That the plaintiff, and Fitzhenry Homer, one of the defendants, were appointed executors of said will, and caused the same to be duly proved and allowed, and took upon themselves the execution thereof. That said Fitzhenry, on the 16th of June 1838, resigned his office

and trust as such executor, and was, upon his own petition, discharged from said office, and all the powers and duties thereof, by a decree of the court of probate : That said testator, at the time of executing his will, and at the time of his death, was seized in fee of a mansion house and its appurtenances, situate in Boston, which were not specifically devised by his will : That the plaintiff was desirous of selling said premises, under and pursuant to the power contained in said will, and on the 18th of June 1838, he and the said Fitzhenry, with the concurrence of the sisters of said Fitzhenry, entered into and signed a memorandum of agreement, viz. that as soon as certain questions, which had arisen upon the proper construction of said will, could be determined,* said Fitzhenry would execute and perform the contract and agreement which he had made for the purchase of said mansion house and its appurtenances, and would pay for the same the sum of \$ 50,000, to the satisfaction of the plaintiff : That Thomas Dixon, together with his wife, Mary Dixon, in her right, and also Georgiana A. Shelton, wife of the plaintiff — the said Mary and Georgiana, with said Fitzhenry, being the heirs at law of said testator, and the parties in interest under his will — executed said agreement, with said Fitzhenry, assenting to and approving the contract of sale thereby made of said premises.

The bill then alleged, that the said questions arising on the construction of said will had been determined,* and that the plaintiff was ready to perform his part of said agreement, and had tendered to said Fitzhenry a good and sufficient deed of said premises, and had offered to deliver the same, upon receiving payment as agreed ; but that said Fitzhenry — alleging that he is and always has been ready and willing to perform the said agreement on his part, if the plaintiff could have made, or can make, a good and valid title to said premises — denies that the plaintiff is empowered by said will to sell and convey said premises, so that he can make a good title to the same, and has refused, and still refuses, to receive said deed and pay to the plaintiff said sum of \$ 50,000.

* See *Homer v. Shelton*, 2 Met. 194.

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The plaintiff therefore prayed that said Fitzhenry might be compelled, by the decree of the court, to perform said agreement and to pay to the plaintiff said purchase money and interest. The plaintiff also prayed, if it should appear to the court that said Fitzhenry is not bound to accept the deed aforesaid, that then the plaintiff might have such further or other relief as the nature and circumstances of his case might require ; that said will might be established, and the trusts thereof performed and carried into execution, by and under the direction of the court, so far as relates to said mansion house and appurtenances, and in order to give a good title thereto to said Fitzhenry, and to enable the plaintiff to settle the estate of said testator, and to distribute the whole amount thereof among those who are entitled to the same, under said will ; that the rights and interests of the plaintiff and of all parties interested and entitled, under said will, in said mansion house and appurtenances might be ascertained and declared by a decree of the court ; that if Nathaniel P. Russell and said Fitzhenry, as trustees, under said will, for said Mary Dixon, and also for said Georgiana A. Shelton, should appear to the court to have any right to or interest in said house and appurtenances, which should be released and conveyed to said Fitzhenry, in order to vest in him a complete and perfect title to the same, they might be authorized and decreed to do all such acts as might be necessary for confirming the title of said Fitzhenry to said premises, and to vest in him such complete and perfect title.

A writ of subpoena issued, directed to said Fitzhenry, and to him and Nathaniel P. Russell, as trustees, under said will, for Mary Dixon and Georgiana A. Shelton, and to said Thomas and Mary Dixon, and Georgiana A., commanding each of them to appear, and to make answer. They thereupon appeared and filed a demurrer to the bill.

Dexter, in support of the demurrer.

Blake, for the plaintiff.

HUBBARD, J. The bill seeks to enforce the performance of a contract alleged to have been made by the defendant, Fitzhenry Homer, with the complainant, as the acting executor of the will

of the late Benjamin P. Homer, for the purchase of a valuable real estate, the mansion house of the testator. The bill is demurred to, on the ground that the complainant has not made out such a case as entitles him, in a court of equity, to any relief, as to the matters contained in the bill.

The question arises on the construction of the clause in the testator's will, by which he authorizes and empowers his executors, or such of them as should take upon themselves the probate of the will, to sell and convey all or any of his real estate, not specifically devised, by public auction or private contract, at the discretion of the executors, for the best price they can obtain, and at such times as they may think proper. Under this clause, the complainant contends that he can, as executor, make a good title to the defendant, Fitzhenry Homer, of the mansion house estate, for an agreed price — the said Fitzhenry having resigned his trust as executor — and that he is bound to receive the deed and to pay for the estate, agreeably to the terms of his contract.

The case has been argued with ability, and the attention of the court has been directed to numerous authorities believed to bear on the question raised at the hearing. It has been argued from the words "executors," and "take upon themselves," being in the plural number, that it was the manifest intention of the testator that all the executors named in the will should join in the execution of the power. But we are of opinion that the term "executors," as here used, relates to those persons who actually become such by taking upon themselves the office, and would have been satisfied, if one only of the appointed executors had been qualified to act. That where all renounce but one, such one has the same power and authority in himself, as though he alone had been named as executor; see *St. 21 Hen. 8, c. 4. Bonifant v. Greenfield*, Cro. Eliz. 80. If therefore the defendant had originally renounced the executorship, we see no reason why the sole executor might not have executed the power; it being conferred on the executors by virtue of their office. When executors are individually named in connection with, and who are to execute, the power; there, all who are mentioned are required to execute it, to give it validity. But where the term used is

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simply that of executors, it applies to those who are such, *virtute officii*. *Sharp v. Sharp*, 2 Barn. & Ald. 405. *Zebach v. Smith*, 3 Binn. 73. *Jackson v. Ferris*, 15 Johns. 346. Pow. Dev. 297. But the present is not the case of a renouncing executor, but of one who has taken upon himself the trust, has exercised it in part, and then resigned his office. *Doyle v. Blake*, 2 Scho. & Lef. 230. 1 Williams on Executors, 149.

In relation to the authority itself, conferred by the will, we consider it a mere naked power, not coupled with a trust. The mansion house estate is not specifically devised, and the authority given to the executors to sell is discretionary ; such a power as the court could not compel them to execute for any purposes required by the will. It is a power not assignable, being specially reposed in the executors by the testator ; nor could it have been executed by a majority of the executors, if there had been more than two.

It is true that one of the executors, (the defendant, Fitzhenry Homer,) prior to executing the contract, resigned his office of executor, and that his resignation was accepted by the judge of probate ; and it is argued by the complainant, that this is equivalent to his never having been qualified for the office. The legal character of this act of resigning his office, after having accepted and acted in it ; whether it can avail to any purpose or not, or whether it is a mere nullity ; the present case does not call upon us to decide. For even supposing it to have been good, so that he can no longer discharge any of the functions of the office, still, as he once accepted the appointment, the authority to execute the power was conferred on him and his co-executor ; it was vested in them, and confined to them, and cannot be performed by one alone. If, then, his resignation is good, the power does not survive to his co-executor, to enable him to pass the estate by force of it. And if the resignation is invalid, and the defendant can now, at his pleasure, resume his trust, then the contract could not be enforced, as a bargain between the two co-executors. Co. Lit. 113 a. At common law, it was held that if one of the executors should die, the survivors could not execute a naked power. The act of all was

considered necessary to give effect to the grant. Co. Lit. 112 a. 181 b. Jenk. 44. *Lock v. Loggin*, 1 And. 145. *Franklin v. Osgood*, 14 Johns. 553. Pow. Dev. 294, 295. 4 Kent Com. (3d ed.) 325. *Peter v. Beverly*, 10 Pet. 564. But it has been held to be sufficient, if the words of the will are answered; and therefore if one make three executors, and devise his lands to be sold by his *executors*, and one of them die before the time of sale, the other two may sell; because the intent of the testator is taken to be that *such executors*, who shall be alive when the land is to be sold, shall sell. Pow. Dev. 296. Still, the general rule undoubtedly is, that naked powers are to be construed strictly, while those which are coupled with a trust are to receive a liberal construction. Whatever, then, might be the authority of the surviving executor to execute this power, in case of the death of the co-executor, it cannot, during the life of each, be executed but by both.

It has been argued also, and authorities have been cited to show, that a trustee may be a purchaser, and that therefore the present defendant, Homer, who now maintains that relation, may be called upon to fulfil his contract.

It is true that conveyances by a trustee to his co-trustee have been sustained, under peculiar circumstances; but the rule, as clearly established in the courts of chancery, both in England and in New York, is, that where a trustee sells the trust estate and becomes himself the purchaser, he acquires only a voidable title, and holds the estate subject to the right of the *cestui que trust* to have the sale set aside, and a new sale ordered under the direction of the court; and this though the sale is at public auction, or otherwise in every respect *bonâ fide*. In the language of Lord Alvanley, "the trustee purchases subject to that equity, that if the *cestuis que trust* come in a reasonable time, they may call to have the estate resold. He must buy with that clog." *Campbell v. Walker*, 5 Ves. 680, 681. See also *Ex parte Bennett*, 10 Ves. 385. *Davoue v. Fanning*, 2 Johns. Ch. 252. At law it has been held differently. *Mackintosh v. Barber*, 1 Bing. 50, and 7 Moore, 315. See also the case of *Harrington v. Brown*, 5 Pick. 521; but there the court observe,

that the principle might be applied here to make the purchaser — an administrator — hold as a trustee for the heirs, and to compel him to sell the land and pay over the excess above what he gave for it.

In the present case, no sale has taken place, but a mere contract for sale has been made, bearing date two days after the resignation, by the trustee, of his office of executor, and, as we may well conclude, agreed upon before such resignation; and this contract we are called upon to enforce. But sitting as a court of equity, we cannot sustain, upon principles of sound policy, contracts of a character like the present. For although we have no reason to doubt that this individual transaction is fair in its motives, and beneficial perhaps to the other children of the testator; still to affirm it would sanction the principle, that an executor may bargain with his co-executor for the estate of the testator, or a part of it, and then, by the resignation of him who is to have the estate, a conveyance can be made to him by the other — and this in the exercise of a mere naked power, and, in the present case, where, as a trustee, he is still in privity with the estate. And though conveyances to trustees may be examined in a court of equity, and set aside, as it regards heirs or *cestuis que trust*, still the conveyance would be voidable only in the first instance, and a title might perhaps be passed to strangers purchasing without notice. To support such contracts and conveyances would lead to frauds upon infants and others unable to protect themselves, and would open wide the door to all the mischiefs which are intended to be prevented by the denial of the right of a person to be both buyer and seller. And though cases may arise where sales to a trustee of the trust property may be supported, yet contracts like the present are not entitled to the sanction of this court. Under these views, the demurrer is sustained, and the bill must be dismissed

THE BOSTON AND WORCESTER RAIL ROAD CORPORATION
vs. GEORGE SPARHAWK & others.
 MARY TOLMAN *vs.* THE SAME.

Where parties agree, though by parol only, upon a divisional line between their adjoining lands, and afterwards hold possession conformably to such line, the possession of one is adverse to the claim of the other and amounts to a disseizin; so that a deed by one, purporting to convey the land thus in possession of the other, passes nothing to the grantee.

Where owners of adjoining lands, intending to establish the divisional line according to the true boundary, agree, by parol, on a line that does not conform to such boundary, and afterwards hold possession according to such conventional line, such agreement, so made by mistake, and the possession under it, do not estop the party, who has suffered by the mistake, from asserting his title to the land that lies between the true boundary line and such conventional line, and recovering the same in a real action seasonably brought; especially if the tenant in such action has not made improvements on the demanded premises of greater value than the land without the improvements, and for which he is not entitled to recover of the demandant.

The *St. of 32* Hen. 8, c. 33, which is a part of the common law of this State, and which provided that no descent to the heir of a disseizor, who had not had peaceable possession for the space of five years next after the disseizin, should toll the entry of him who has right to the land, extends not only to disseizins by actual expulsion, but also to all disseizins whereby, on the death of the disseizor, a descent is cast on the heir.

THESE were writs of entry, in which the several demandants sought to recover of George Sparhawk and Mary S. his wife, and Paschal P. Pope, the same parcel of land, viz. a narrow piece of flats situated in a cove at the southerly part of Boston, westerly of Washington Street. Writs dated Feb. 9th 1842.

At the trial, before *Wilde, J.* it was admitted that Robert P. Tolman and Mary his wife, in her right, were lawfully seized in fee, prior to the year 1822, of a parcel of upland on Washington Street, and of the flats legally appurtenant thereto; and that Johnson Jackson (the father of Mary S. Sparhawk, one of the tenants, and of Benjamin C. Jackson, under whom Paschal P. Pope, another of the tenants, claims title) was lawfully seized of another parcel of upland on Washington Street, adjoining northerly on said land of Tolman and wife, and of the flats legally appurtenant thereto; and that said Johnson Jackson died so seized, on the 16th of November 1824.

Boston and Worcester Rail Road Corporation & Tolman v. Sparhawk & others.

The Rail Road Corporation, demandants in the first action, put into the case a deed from said Robert P. Tolman, (who died on the 5th of September 1839,) and Mary his wife, in her right, dated May 7th 1833, whereby they conveyed to said corporation their said upland on Washington Street, "and all the flats legally appurtenant thereto." They then called Stephen P. Fuller as a witness, who testified that the southerly line of the demanded premises (as laid down on a plan which he produced) was the line fixed by the decision of the court in the suit heretofore instituted by Sparhawk and wife,* as the northerly line of the Jackson estate: That he was employed, under the direction of the court, in that case, to lay down the lines dividing a section of the cove, and that this line between the Tolman estate and the Jackson estate was one of those lines: That the plan which he produced was made by him, and that the southerly line of the demanded premises, as described in the demandants' writs, was the line fixed by the court, as above mentioned, and as laid down on said plan.

The witness was then examined by the tenants; and he testified, that on the 24th of August 1822, Edward Tuckerman, (who owned a lot bordering on the cove, and next southerly of the Jackson lot,) Johnson Jackson, Robert P. Tolman, and Thomas Brewer, (who owned the lot next northerly of the Tolman lot,) met on the land for the purpose of running the lines on the flats: That they agreed that Tuckerman's line should run parallel with Castle Street, (a street running westerly from Washington Street to the cove,) and 73 feet and 4 inches distant therefrom; that Jackson's line should run 67 feet and 10 inches from Tuckerman's, and the line of the Tolman lot 94 feet from Jackson's: That on the 29th of the same August, the witness ran out these lines, and that stakes were driven into the mud, from 50 to 100 feet apart, to show said lines, and extended from 500 to 600 feet down on the flats: That after the Rail Road Corporation purchased of Tolman and wife, and before they purchased a piece of land of Mary S. Jackson, (now

See Sparhawk & wife v. Bullard, 1 Met. 95, 103.

Mrs. Sparhawk,) the witness made a plan for the corporation, in which the abovementioned conventional line was laid down as the dividing line between the Tolman and Jackson flats : That in 1836 or 1837, the city government caused a part of the Jackson flats to be filled up, from about two or three feet south of this conventional line : That the earth was brought in by the Rail Road Corporation, who were paid therefor by the city ; and he understood that the city charged the expense to Mrs. Sparhawk : That he never knew that any question was made about this conventional line, until the suits were brought by Sparhawk and wife, in which the court decided that it was not the true line : That a house (called the Gouch house) was built in 1824, below high water mark, and that its rear now stands on this conventional line : That there was no particular occupation of these flats, below the Gouch house, until recently : That he did not know that said stakes were ever pulled up ; but that his attention was not particularly called to them : That in 1833, when the deed from Tolman and wife was made to the Rail Road Corporation, he believed there was nothing on the flats to designate the lines ; that he then saw no stakes ; and that all the flats lay open, from Orange Street round to Claffin's lot on Pleasant Street, and including the demanded premises : That he never saw Mary Tolman, and did not know that she had any knowledge of the settlement of the line.

The tenants then put in a deed from said Mary Tolman to said Mary S. Sparhawk, dated June 1st 1841, releasing the land which, by the conventional line, would be a part of the Jackson estate, but which, by the true line, was a part of the Tolman estate : (This deed was introduced merely as evidence of the confirmation of the agreement of August 1822, as to the lines of division, and with an express understanding and declaration, that it should not be relied on by the tenants as an estoppel.) Also a deed, dated December 10th 1833, from Mary S. Jackson (now Mrs. Sparhawk) to the Boston and Worcester Rail Road Corporation ; and two deeds from Benjamin C. Jackson to Paschal P. Pope ; these three deeds being also introduced as further evidence of the confirmation, by the grantors, of said agreement of August 1822.

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C. P. Curtis & B. R. Curtis, for the respective demandants. If Mrs. Tolman was not disseized of the demanded premises, when her deed was made to the Rail Road Corporation, the corporation is entitled to recover. And it is submitted, that she was not disseized by Jackson; that there was not such an inclosure of the flats, nor such actual, positive and notorious occupancy by him, as amounted to a disseizin. *Jackson v. Schoonmaker*, 2 Johns. 230. *Coburn v. Hollis*, 3 Met. 128, 129.

If, however, the court shall decide that Mrs. Tolman was disseized, then she is entitled to recover. It will be objected to her right of recovery, that her right of entry was tolled by the death of Jackson, the disseizor, and the descent cast on his heirs, before the change was made in the law on this subject by Rev. Sts. c. 101, § 5. But Jackson died within five years after the disseizin; and therefore, by St. 32 H. 8, c. 33, (which is the common law of this State,) the right of entry was not tolled. Stearns on Real Actions, 65. 2 Pick. 489. 2 Met. 585. Besides; Mrs. Tolman was under coverture at the time of the disseizin, and therefore had a right of entry after her husband's decease. Lit. § 403. Co. Lit. 246 a.

It will also be objected, that Mrs. Tolman is bound and estopped by the agreement between her husband and Jackson, as to the line. But she, as a feme covert, was not barred by that agreement, and would not have been, after her husband's death, even if she had personally consented to the new line. Com. Dig. Estoppel, C. The agreement, in this case, estops no party. The putting down of the stakes, to mark the line, constitutes no bar. Perhaps the filling up of the flats might avail the tenants, (according to some decisions in New York,) if it had been done by them. But this was done by the city; and there is no evidence that it was paid for by the tenants. It is doubted, in *Parker v. Barker*, 2 Met. 423, whether there can be an estoppel *in pais*, as to real estate. And an agreement by parol, as to boundaries, does not bind the parties. *Whitney v. Holmes*, 15 Mass. 152. *Gove v. Richardson*, 4 Greenl. 327.

The cases, in which awards as to boundary lines have been held conclusive, stand on different reasons, and have no applica-

tion to the present case. So of the cases in New York, where an open occupation, according to the agreed line, and an expenditure made by one party on the faith of the agreement, are held to estop the other party. See *Adams v. Rockwell*, 16 Wend. 310, which shows the result of all the former decisions in that State. In *Sawyer v. Fellows*, 6 N. Hamp. 107, the line was run by a surveyor, at the request of both parties, and was accepted, and a fence built thereon, and an occupation accordingly for ten years. This case, therefore, falls within the doctrine of the New York cases. But in the case at bar, there have been no acts which estop the parties.

J. P. Rogers & Sparhawk, for Sparhawk and wife. The Rail Road Corporation cannot recover, because they took nothing by their deed, as the grantors were disseized at the time it was made. The possession of Jackson and his heirs, under the agreed line of 1822, was adverse. *Proprietors of Kennebec Purchase v. Laboree*, 2 Greenl. 280. *Brown v. Wood*, 17 Mass. 74. *Prescott v. Nevers*, 4 Mason, 326. 4 Kent Com. (3d ed.) 482. *Ellicot v. Pearl*, 10 Pet. 442. *Ewing v. Burnet*, 11 Pet. 52.

In order to convey the demanded premises to the corporation, the grantors should have entered and delivered possession on the land; and they would have done so, if they had intended to convey them. The corporation had knowledge of the adverse possession of Jackson's heirs. See *Jackson v. Matsdorf*, 11 Johns. 97. *Little v. Libby*, 2 Greenl. 242. *Mason v. Muncaster*, 9 Wheat. 445. *Small v. Procter*, 15 Mass. 495.

Nor can Mrs. Tolman recover; for she had no right of entry when her action was commenced. That right was tolled by the descent cast in 1824. When the descent was cast, she had both a right of action and a right of entry. 2 Stark. Ev. 512. Stearns on Real Actions, 66.

The St. 32 H. 8, c. 33, applies only to tortious and forcible entries. Co. Lit. 238 a. Stearns, *ubi sup.* In the case at bar, Jackson's entry was rightful. *Cook v. Stearns*, 11 Mass. 537. *Pond v. Pond*, 14 Mass. 403. *Whitney v. Holmes*, 15 Mass. 152. It is true, that the doctrine of disseizin has been

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extended in this State ; but there is no adjudication which has also extended the operation of that statute.

Robins, for Pope. There is an estoppel *in pais*, by the agreement of 1822. *Sawyer v. Fellows*, 6 N. Hamp. 107. *Singleton v. Whiteside*, 5 Yerg. 18, and cases there cited. *Riggs v. Parker*, Meigs, 43. *Adams v. Rockwell*, 16 Wend. 285, and cases there cited. And this agreement estops Mrs. Tolman, though she was a feme covert when it was made. *Yarborough v. Abernathy*, Meigs, 419.

WILDE, J. * *The Rail Road Corporation*, demandants in the first of these actions, derive their title to the demanded premises by a deed from Robert P. Tolman and Mary his wife, in her right, bearing date May 7th 1833, who, as was proved or admitted at the trial, were lawfully seized in fee of a parcel of upland on Washington Street, and of the flats legally appurtenant thereto, prior to the year 1822 ; which, according to former decisions of this court, included the demanded premises. But it was proved at the trial, that on the 24th of August in that year, Johnson Jackson, (the father of Mrs. Sparhawk, one of the tenants,) E. Tuckerman, T. Brewer and Robert P. Tolman, agreed to run out the divisional lines of their lots over the flats, and that they were so run as to include the demanded premises within the flats belonging to the said Johnson Jackson ; that these lines were agreed to by the parties ; and that stakes were driven down in the mud, as the boundaries of their respective lots. There was no evidence to prove that these conventional lines were ever questioned previously to the conveyance from the said Tolman and wife to the demandants.

Upon these facts, the tenants contend that nothing passed by the deed of Tolman and wife to the demandants ; the grantors not being in possession of the premises at the time of the grant. And we are of opinion, that this ground of defence is clearly sustained by the evidence reported. By the agreement of the parties, the conventional lines were established as the true divisional lines of their lots, so far as they could by law be established by a parol agreement. From the time of that agreement, the possession of

* *Hubbard, J.* did not sit in these cases.

the flats demanded must be considered as being and continuing in Jackson and his heirs. And their possession was clearly adverse to the claim of Tolman and his wife. And they acquiesced in this adverse possession. They were therefore dispossessed and disseized ; and although this was in consequence of their own consent, yet they had no right in the premises besides a right of entry, or a right of action, which could not be legally conveyed to a purchaser.

Judgment for the tenants.

In the case of *Mary Tolman* against the same tenants, the same flats are demanded ; and the first question is, whether the conventional line of August 1822 is not conclusive as to the title, by way of estoppel. This question has been much discussed in the State of New York, and was very fully considered by the court of errors, in the case of *Adams v. Rockwell*, 16 Wend. 285. And the judgment of the supreme court was reversed by the concurring opinions of all the members of the court, (twenty-one being present,) with but one dissenting voice. In that case, it was decided, that where lands are described in a deed conveying the same, so that the location of the tract can be ascertained with certainty, the owner may assert his right to hold according to the true boundaries of his lands, although an encroachment has been made upon him by the owner of an adjoining tract, and though a line has been maintained by the occupant, in pursuance of such encroachment, and has been acquiesced in by the party encroached upon, for eleven years, if the lands in dispute are in a state of nature, and no other occupation has been had of them than the cutting down and carrying away of trees and timber ; but that if, during such acquiescence, expensive improvements have been made by the occupant upon the premises in dispute, the owner would be estopped from setting up the true line.

In several cases, however, the supreme court in New York have decided, that where the owners of two adjoining lots expressly agree to settle an uncertain or disputed line between their respective lots, the parties having full knowledge of their rights,

and the agreement being followed by occupation for a long time, and valuable improvements having been made on the land in dispute, such an agreement, under such circumstances, will conclude the parties, although it may be clearly shown that the conventional line did not conform to the true line. But in almost all the cases in which this principle is recognized, there had been an occupation, in pursuance of the agreement, for more than twenty years. And although these decisions are not overruled by the final decision of the case of *Adams v. Rockwell*, yet the principle on which some of them were decided is certainly questioned in the opinions delivered by the chancellor and another member of the court of errors. In this Commonwealth and in Maine, such a parol agreement, not followed by valuable improvements, has been held to be evidence of the accuracy of the line thereby established; though it is not conclusive to prevent either party from showing that it was settled erroneously. It was so decided in *Whitney v. Holmes*, 15 Mass. 152, and in *Gove v. Richardson*, 4 Greenl. 327. And the same doctrine was laid down by Story, J. in *Wakefield v. Ross*, 5 Mason, 16. In the latter case, it appeared that the owners of two adjoining lots of land had agreed to erect a fence on what was supposed to be the true boundary, and that the possession continued according to that line for twenty years; and it was held, that in the absence of all counter proof of any other actual boundary, that line ought to be deemed the true one.

In these cases, the question of estoppel was not discussed and considered, and whether, if considered, it would have altered the decisions, it is not necessary to decide.

That a parol agreement not in writing is valid, so as to pass any title to lands, cannot be maintained under any circumstances. It may justify the occupation of the lands by the respective parties, in pursuance of the agreement; and by such an occupation under a claim of right, if long enough continued, a legal title may be acquired. And such an agreement and occupation under it, though not continued twenty years, may perhaps, under certain circumstances, operate as an estoppel, according to some of the decisions in the New York cases. Under what circum-

stances such an agreement would be held to operate in that State, by way of estoppel, seems to be left doubtful by the decision of the court of errors in *Adams v. Rockwell*. But however this may be, we are well satisfied, that on principles of law well established, it cannot so operate, where the agreement to establish an erroneous line is founded on a mistake ; the parties supposing the line agreed upon to be the true boundary ; nor unless the occupant shall have made improvements on the premises, between the true and the erroneous lines, exceeding in value the value of the land without such improvements ; nor even then, if the occupant making the improvements may be entitled to recover from the owner of the land the value of the improvements. To hold, that under such circumstances a party might be prevented from asserting his title to his land, by the doctrine of estoppel, would be an evasion of the statute of frauds, and against manifest justice. And we think the present case falls within the distinction stated. We have good reasons to believe that the parties, who run out these erroneous lines, supposed them to be the true lines of their respective lots, and that they had no knowledge that they would intersect the lines of other lots further to the northward, belonging to owners who were not parties to the agreement. Mr. Sparhawk has attempted, at great expense, to maintain these conventional lines, which were eventually found to be erroneous, and were so adjudged by the court in several cases ; so that the parties to the agreement in question cannot hold their lands according to the agreement ; and to hold them nevertheless bound by the agreement *inter sese* would be manifestly unjust.

In the second place, whatever improvements have been made by the tenants, they will be entitled to receive the value of them from the demandant, unless she should elect to relinquish her estate according to the provisions of the Rev. Sts. c. 101, §§ 29-34. And thus equal justice will be done to both parties.

This case differs essentially from that of *Goodridge v. Dustin* (*ante*, 363). In that case, the divisional line between the lands of the parties was uncertain, and it was submitted to referees, by a rule of court, to settle the line, and their award

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was held to be conclusive on the parties. That reference was not founded on any mistake as to the true divisional line, and consequently the decision as to the conclusive effect of the award is not applicable to the present case.

Another ground of defence on which the tenants rely is, that the demandant's right of entry has been tolled by the descent cast upon the children of Johnson Jackson, on his death. By the common law of England, the demandant's right of entry would be thus tolled, if Johnson Jackson is to be considered as a disseizor. But by *St. 32 H. 8, c. 33*, it is enacted, that where one person disseizes or turns another out of possession, no descent to the heir of the disseizor shall take away the entry of him who has the right to the land, unless the disseizor has had peaceable possession by the space of five years next after the disseizin, without either entry or claim. The common law, thus amended before the emigration of our ancestors, undoubtedly became afterwards the common law of this Commonwealth. *Putney v. Dresser*, 2 Met. 585. And as Johnson Jackson died in 1824, less than five years after the making of the conventional line and the occupation conformably thereto, this ground of defence fails.

It was argued, that the *St. of H. 8* embraced only disseizins by actual expulsion; but we think there is no ground for this distinction. The statute was clearly intended to alter and amend the common law, and extended to all disseizins whereby on the death of the disseizor a descent in fee was cast on the heir.

THOMAS BREWER vs. THE BOSTON AND WORCESTER RAIL
ROAD CORPORATION.

A. and B., owners of adjoining land, intending to establish the divisional line according to the true boundary, agreed, by parol, on a line that did not conform to such boundary, and afterwards held possession according to such conventional line: B. sold his land to C.: Before the sale, A. stated to C. that the land which he (A.) claimed was bounded by said conventional line between him and B. and that he did not claim beyond that line: After the sale to C., he made improvements on the land next to such conventional line, with the knowledge of A., who was often present and pointed out said line, without expressing any dissent to C.'s proceedings, or giving notice that he had any claim to said land: A. afterwards discovered that said conventional

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line was not the true dividing line, and that C. was in possession, as B. had been, of a piece of land which, according to the true line, belonged to him, (A.,) and he therefore brought a writ of entry against C. to recover the land between the true line and said conventional line. *Held*, that A. was not estopped to claim this land of C., as he had acted under a mere mistake, without fraud or gross negligence.

WRIT OF ENTRY to recover a small parcel of flats appurtenant to the demandant's upland, and situate in the same cove that is mentioned in the cases of the present tenants and Mary Tolman against Sparhawk and others, *ante*, p. 469.

The case was submitted to the court on a statement of facts, as follows : On the 24th of August 1822, the demandant and Robert P. Tolman, under whose wife, Mary Tolman, the tenants claim, agreed that the dividing line between their land and flats below high water mark should begin at the westerly corner of a stone wall standing on the land then belonging to the demandant, and should run thence northwesterly, parallel with Castle Street, and 235 feet distant therefrom, to low water mark, or so far as these flats extended : Until the decision of this court, in the case of *Sparhawk & wife v. Bullard*, (1 Met. 95,) the line then agreed on was always considered as the true boundary line between the flats of the demandant and the flats of said Tolman and wife, now belonging to the tenants : The demandant always claimed to own the flats lying northeasterly of said line, and exercised various acts of ownership on the same : He stated to the agent of the tenants, before they purchased the land and flats of said Tolman and wife, that the land, which he claimed, lay northeasterly of said line, and that he did not claim the land southwesterly of said line ; and he has also made similar representations to others : After the tenants purchased of Tolman and wife, they proceeded, with the knowledge of the demandant, to fill up said land lying southwesterly of said line, and to erect buildings and fences thereon, and exercise other acts of ownership on the land ; and the demandant was frequently present and saw said improvements, and pointed out the said line, and never expressed any dissent to said proceedings, nor gave any notice to the tenants that he had any claim to the said land.

When said agreement of August 24th 1822 was made, the afore-

said suit of *Sparhawk & wife v. Bullard* had not been brought, and the parties acted under the belief that their respective flats were by law in the direction and in conformity to the lines then agreed on. Said Robert P. Tolman, however, had no title to the upland or flats, besides what belonged to him as husband of Mary Tolman, who was seized thereof in the manner shown by the deeds, &c. which are made part of this case. [Here the parties set forth various deeds, proceedings of the probate court in the division and settlement of estates, &c. from 1730 downwards ; from which the tenants, at the argument, contended that the demandant had *no title* to the flats in question.]

The parties agreed that "if, upon the foregoing facts, deeds, &c. the court shall determine that the demandant is entitled to any flats, (which is denied by the tenants,) they shall be assigned to and recovered by him, in conformity to the lines and principles established in said case of *Sparhawk & wife v. Bullard* ; unless the court shall determine, upon said facts, that the demandant is by law estopped, as against the tenants, from claiming the flats appurtenant to his upland in the direction as settled by said case ; in which event, the demandant is to recover in such manner and direction, if at all, as the court shall adjudge."

It was further agreed that the court might draw all such inferences from the foregoing facts, deeds and documents, as a jury could draw.

Bartlett, for the demandant. The demandant is not estopped to claim the flats demanded in this suit. There is no technical estoppel ; for that must be by deed or record. Per Bronson, J. 3 Hill, 221. The doctrine of estoppels *in pais* has been introduced into courts of law from courts of chancery. But even in a court of chancery, fraud is an element of such estoppels, or such carelessness as amounts to a fraud on one who acts on the faith of an agreement, a representation, or the silence of a party who is apprized of the facts of the case. 1 Fonbl. Book I. c. 3, § 4. 2 Sugd. Vend. (Amer. ed. of 1836) 299. 1 Story on Eq. § 386. And this doctrine has frequently been applied by courts of law, in suits as to *personal property*. *Hall v. Huse*, 10 Mass. 39. *Whitaker v. Sumner*, 7 Pick. 556

Jones v. Sasser, 1 Dev. & Bat. 452. *Dezell v. Odell*, 3 Hill, 215. *Mackay v. Holland*, and *Dewey v. Field*, 4 Met. 69, 381. *Pickard v. Sears*, 6 Adolph. & Ellis, 474. *Welland Canal Co. v. Hathaway*, 8 Wend. 480.

As to *real estate*, it has been held in this State and in Maine, that boundary lines, agreed on by the parties, are to be regarded as the true lines, unless the contrary is clearly shown ; but that a party, by clear proof of the true line, may claim according to it, unless he has practised a concealment that amounts to a fraud. *Pond v. Pond*, 14 Mass. 403. *Whitney v. Holmes*, 15 Mass. 152. *Stone v. Clark*, 1 Met. 378. *Parker v. Barker*, 2 Met. 423. *Gove v. Richardson*, 4 Greenl. 327. *Moody v. Nichols*, 4 Shepley, 23. *S. P. Wakefield v. Ross*, 5 Mason, 16. In the case at bar, the attempt is to apply an estoppel where the demandant's real title is unquestionable, and where there has been no fraud, misrepresentation or carelessness on his part, but a mere mistake common to him and his adjoining neighbors. Nothing was given up by way of settling a boundary, nor was there any compromise ; for there was no previous dispute or disagreement.

If the New York doctrine, on which the tenants will rely, is to be introduced into our jurisprudence, yet that doctrine will not work an estoppel in this case. All the New York cases were those of boundary, and they stand on two propositions : 1st, Express agreement, fixing the line on both sides, and possession accordingly ; or 2d, acts and declarations, and expenditures made on the faith thereof, and long occupation and acquiescence. And all those decisions were greatly affected by the fact, that there is no law in New York by which a demandant may be made to pay for improvements on the demanded premises. See 16 Wend. 313.

The English cases of estoppel *in pais* are mostly cases of awards, or something in the nature of a judgment, and relate to boundaries merely. No case goes to the forfeiture of a whole estate. But in the case at bar, the question is not one of mere boundary. If the demandant is estopped, he loses all his flats ; for as there is no estoppel to the north, he can have flats nowhere, unless he can those which he demands in this action.

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C. P. Curtis, for the tenants. The acts and declarations of the demandant estop him from claiming the premises which he now demands. *Jackson v. Ogden*, 4 Johns. 143, per Spencer, J. 7 Johns. 241-243, per Kent, C. J. Fraud is not necessary to an estoppel in such a case as this. "Where the representation is made through a mistake, if the person making it might have had notice of his right," the purchaser shall hold the land. 2 Sugd. Vend. (Amer. ed. of 1836) 300. See *Jackson v. Van Corlaer*, 11 Johns. 123. *Rockwell v. Adams*, 7 Cow. 761 : 6 Wend. 467 : S. C. in error, 16 Wend. 285. *Kip v. Norton*, 12 Wend. 130. *Dibble v. Rogers*, 13 Wend. 536. *Sawyer v. Fellows*, 6 N. Hamp. 107. *Tarrant v. Terry*, 1 Bay, 239. *Hatch v. Kimball*, 4 Shepley, 146.

Whitney v. Holmes, 15 Mass. 152, only decided that the agreement in that case was not conclusive. But Parker, C. J. said, that if it had been submitted to a jury, it might have availed. In *Gregg v. Wells*, 10 Adolph. & Ellis, 98, Lord Denman says, "a party who negligently or culpably stands by and allows another to contract on the faith and understanding of a fact which he can contradict, cannot afterwards dispute that fact in an action against the person whom he has himself assisted in deceiving." In *Wallis v. Truesdell*, 6 Pick. 457, Wilde, J. said, that if the plaintiff's declarations had been acted on by the other party, and the plaintiff had thereby acquired an advantage, such declaration would have been conclusive. See also 8 Yerg. 398.

The opinion of the court was delivered March 18th 1844.

WILDE, J.* At the argument of this cause, several questions were discussed by counsel, one of which has since been decided in the case of *Tolman v. Sparhawk & others* (ante, 469). It was objected in that case, as it was in this, that the parties to a parol agreement, establishing a divisional line between two adjoining lots of land, were estopped to prove that the line thus established was not the true line. The decision, however, in that case was, that where a line thus agreed upon was supposed by the parties to be the true line, and afterwards it appeared that it

* Hubbard, J. did not sit in this case

was not, such a parol agreement, founded in mistake, would not be binding, by way of estoppel or otherwise. But it has been argued in this case, that the demandant is estopped by his admissions and representations made to the tenants' agent, before their purchase of the demanded premises. It is agreed that the demandant stated to the tenants' agent, before they purchased the flats demanded, that his flats lay northerly of the agreed line, and that he did not claim the land lying southwesterly of said line. But it is also agreed, that the parties to the said parol agreement acted under the belief that their respective flats were in the direction and in conformity to the line agreed on. We must therefore consider the declarations and admissions of the demandant as having been made in good faith, and by mere mistake. And admissions thus made do not, we think, by law operate by way of an estoppel. This kind of estoppel was first established by courts of equity, and has since, to a certain extent, been adopted by courts of law. It is founded on fraud, or gross negligence amounting to fraud. 1 Story on Eq. §§ 386, 391. The doctrine, we think, is correctly laid down by Nelson, J. in *Welland Canal Co. v. Hathaway*, 8 Wend. 483. "As a general rule," he says, "a party will be concluded from denying his own acts or admissions, which were expressly designed to influence the conduct of another, and did so influence it, and when such denial will operate to the injury of the latter, and where in good conscience and honest dealing he ought not to be permitted to gainsay them." The same doctrine, substantially, is laid down in *Pickard v. Sears*, 6 Adolph. & Ellis, 474. "The rule of law is clear," says Lord Denman, "that where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time." Now it does not expressly appear by the case stated, that the declarations of the demandant were made to the tenants' agent with a view to influence their conduct, or that he had knowledge of their intention to purchase. Nor does it appear that the tenants will be injured by the recov-

ery of the flats ; for if they purchased with warranty, they may be indemnified. We do not, however, decide the case on these considerations, but on the ground that the demandant has acted fairly, under a mistake, and that he has made no declaration contrary to his honest belief at the time, or with any intention to deceive the tenants. And we think it clear, that declarations thus made do not operate in the nature of an estoppel.

A party is not to be estopped to prove a legal title to his estate, by any misrepresentation of its locality, made by mistake, without fraud or intentional deception, although another party may be induced thereby to purchase an adjoining lot, the title to which may prove defective ; for he may require a warranty ; and it would be most unjust that a party should forfeit his estate by a mere mistake.

The other objection to the demandant's title is, that his lot of land is not bounded by the sea, or salt water, and consequently that he has no title to flats demanded, nor indeed to any other flats. This objection is inconsistent with the first objection founded on the parol agreement to settle a divisional line between the flats of the demandant and those of the tenants' grantor ; but if this agreement was founded in a mistake as to the demandant's title, the tenants will not be estopped to prove it — for the reasons already expressed. This, however, we think they have failed to do. [Here the judge stated the contents of the demandant's ancient and recent title deeds, and of the other documents put into the case.] Upon the whole evidence, we are of opinion that the demandant has satisfactorily proved the elder and better title, and that he is entitled to the flats below his upland, to be assigned to him in conformity to the lines and principles established in the case of *Sparhawk & wife v. Bullard*, 1 Met. 93, and that judgment therefor should be entered accordingly.

WILLIAM WRIGHT vs. ABRAHAM A. DAME & others.

K., being about to purchase land that was held in trust, made a contract with the trustee for the conveyance thereof, which contract in terms recognized the trust, and provided for its execution: K. subsequently required and received from the trustee and the *cestui que trust* a joint deed of the land, under circumstances which left it doubtful whether the purpose of such deed was to discharge the land from the trust: Afterwards, in an agreement between K. and the trustee for a resale of an undivided moiety of the land to the trustee, the terms of the first contract were recited, and were not declared to have been vacated: The *cestui que trust* afterwards aided in the organization of a corporation, and in the passing of a vote authorizing the purchase of said land by the corporation, without disclosing that he regarded the land as chargeable with a trust in his favor: The land was thereupon conveyed to the corporation, the sole members of which were the trustee, the *cestui que trust*, K. and his partners, who were affected with notice, and persons holding stock for the benefit of K. or his partners.

Held, that the recital and agreement of resale revived the trust, if it had been waived by the joint deed of sale, and confirmed it, if it had not been thereby waived.

Held also, that the trust was not waived, as to the corporation, by the conduct of the *cestui que trust*, but that the corporation took the land subject to the trust.

THIS was a bill in equity, in which the plaintiff sought to charge the defendants with the execution of a trust. (See former proceedings in this case, in 22 Pick. 55. 1 Met. 237.) The facts of the case are fully set forth in the opinion of the court.

The argument was had at the last March term.

Greenleaf & J. P. Rogers, for the plaintiff.

Bartlett & B. R. Curtis, for the defendants.

HUBBARD, J. This case comes before the court on the amended bills and answers, and sundry depositions and proofs; and the following appear to be the material facts upon which the questions arise, and which have been argued by the counsel in the case:

In the year 1826, sundry individuals, of whom the complainant, Wright, was one, procured an act from the legislature, authorizing them to erect a free bridge from or near Sea Street to South Boston, where Wright lived. This movement brought the flats, lying on the line and in the vicinity of the contemplated bridge, before the public as an object of valuable speculation, into which the complainant entered; and through the aid of N. R. Cobb, of the house of Freeman, Cobb & Co., (and having an un-

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derstanding with Dame to become interested therein,) he made the bargain for the flats which are the subject of the present controversy. At the time when the purchases were completed, in May 1827, he received from Cobb the means of paying the purchase money, and Cobb also agreed to make further advances to enable him to fill up the flats and make them saleable for building lots. For the purpose of interesting Dame in the purchase, and to secure his name and joint coöperation in the business, the complainant made a conveyance of an undivided half of the premises to Dame, and they, on the same day, joined in a conveyance of them to Cobb, by two mortgage deeds to secure the money advanced for the consideration of the land, and to supply the means for filling up the flats. About the same time, an obligation was also given to one Thomas Kendall, in consideration of services rendered in regard to the purchase of the property, and for future advice and supervision concerning the filling up of said land and making sales thereof, to account with him, on the close of the speculation, for one fifth part of the net profits. Under these arrangements, the parties, Wright and Dame, went on expending large sums of money in filling up the flats, a part of which money appears to have been supplied by Dame from his own resources, and a part from Cobb, who gave them assistance, from time to time, taking security on the property. The parties being disappointed in not making sales as they expected, and Wright, being apparently considerably indebted to Dame, for the purpose of giving him security, conveyed to Dame his undivided half of the premises, by deed of release and quitclaim bearing date September 29th 1829, and subject to the outstanding mortgages in favor of Cobb. At the same time, they entered into an agreement, by which the trusts were set forth under which Dame was to hold the estate ; one of which was, that Dame should not sell any part of it without the written consent of said Wright, until after the 1st day of May 1832 ; at the end of which time, as much of the land and property, so released by said Wright to said Dame, as should be necessary for the payment of all debts due from said Wright to said Dame, and of all moneys which said Dame might have paid

or should thereafter pay to said Cobb and the Boston Free Bridge Corporation, on said Wright's account, and all taxes and expenses incurred on said property, with interest thereon half yearly, should be sold in suitable house or store lots, and the same should be disposed of at public auction. And it was also further agreed, that the proceeds of the sales should be applied to the payment of any just and lawful claims or demands which said Dame might have against said Wright, and also for the payment of any sum or sums which said Dame might have or should have advanced towards said Wright's half part of the expenses and cost of the improvements, made by said Wright and said Dame on said premises ; and also for the payment of any sum or sums which said Dame might have advanced for said Wright, to pay his subscription or assessment to the Boston Free Bridge Corporation ; and also for the payment of any sum which said Dame might be liable for and pay, on account of said Wright, to said Cobb. And no more of said premises were to be sold than what might be necessary to pay the amount due from said Wright to said Dame, and for said Dame's liabilities as aforesaid, and the interest thereon half yearly, and all taxes and expenses incurred on said property, during said term. And the residue of said premises, if any, were to be reconveyed by a deed containing covenants of warranty against all claims and incumbrances by said Dame, his heirs or assigns, to said Wright by said Dame, on demand, after the several claims and demands should be paid as aforesaid ; and said Dame was not to institute or cause to be instituted, or suffer any suit to be instituted, against said Wright, during said term ending May 1st 1832, or on any claim or demand which he might now have against him. And it was understood that Dame was to credit Wright for his share of the rents and profits of the land and estates held by said Dame under the agreement.

After the time arrived, specified in the contract, and when Dame was authorized to make sale of the estate, a sale could not be effected advantageously. A project was soon after started, among persons interested in the surrounding flats, to procure the termination of the Boston and Worcester Rail Road

somewhere on the flats west of Sea Street ; and, to promote it, a joint stock company or corporation was proposed, in which all the flats might be embraced, including those owned by said Wright and Dame ; and in consideration of this, an authority was given by Wright to Dame, to put any part or the whole of said flats, westerly of Sea Street, into a joint stock company or corporation, on the terms specified in an instrument executed by said Wright under the date of October 1st 1832. And in January 1833, the South Cove Company was incorporated. But no agreement was made under it in regard to the Wright and Dame flats. It, however, probably led to the act which said Wright and Dame afterwards obtained, on the 1st of April 1834, incorporating them and their associates as the South Wharf Corporation ; by virtue of which, authority was given to purchase the said property and to hold the same in shares, as a body corporate ; the object being to enable them to dispose of the property, under said powers, to better advantage. Just before this time, (March 27th 1834,) said Wright and Dame being pressed by Cobb for part payment of the moneys advanced by him, procured from Dr. G. C. Shattuck \$ 15,000, on mortgage of a part of the premises lying east of Sea Street, which was paid over to said Cobb. The said Cobb, then being in a feeble state of health, on or about the 2d of May 1834, conveyed to H. S. Kendall and Charles L. Roberts, two of his partners, all his interest in said lands, together with his notes, mortgages, claims and demands upon said lands, and upon Wright and Dame, jointly and severally, and shortly afterwards died : And in the following July, Roberts released his interest in the same property to said H. S. Kendall. After this, no facts of importance, touching the case, are stated, till about the month of July 1835, when a negotiation took place between said Kendall, the assignee of Cobb's interest, and Dame, for the purchase of the whole property. This led to a further agreement between Wright and Dame, which bears date July 7th 1835, in which, after reciting in part the indentures of September 29th 1829, and referring to a proposition then made to buy the same lands, it went on to authorize Dame to sell the whole of the estate at private

sale, for the most he could obtain over \$ 170,000, but not for a less sum ; and the authority thus given was on the express condition, that Dame should appropriate the proceeds so far as to cancel the debts, demands and liabilities therein referred to, and the residue of Wright's interest in said property, as secured to him by said agreement, should, instead of a reconveyance of land, as therein provided, be *paid to him by said Dame, in money or other satisfactory security on demand* ; and it was also provided, that any failure on the part of said Dame to perform his obligations to said Wright, as expressed in this agreement, should operate to exonerate said Wright from any obligation to abide by the authority therein given to said Dame relative to the disposition of said land and estate at private sale.

Two days after this, viz. on the 9th of July 1835, Dame and the said H. S. Kendall entered into an agreement, by which Dame agreed to sell the estate to Kendall, with certain reservations not necessary to be mentioned, and also referring to the mortgages of Cobb and Shattuck, which were to be assumed and paid by said Kendall, and the amount thereof allowed by Dame as a part of the purchase money ; and Dame was to convey the same title and interest in said estate which was conveyed to said Wright, warranting against all persons claiming by, from or under him or said Wright ; and said Kendall agreed to give said Dame, for said estate, the sum of \$ 170,000, payable as follows : “ To assume and pay said mortgages, *and the balance, so far as one moiety thereof, to pay in cash or such security as shall be satisfactory to said Wright* ; and as to the balance, by notes and mortgages of said estate on demand, or on such time and times as shall be mutually agreed on, and on interest.” And in the same instrument, Dame acknowledged to have received the sum of \$ 700 in part consideration for said estate.

On the making of this agreement, Kendall consulted his counsel — being the same whom he and Cobb had been in the habit of advising with — who was acquainted with the previous conveyances which existed between Wright and Dame ; and he advised him, for the purpose of cutting off and extinguishing all trusts and rights of every sort, and to obtain a title free from

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all incumbrances, liens or trusts, to require and receive from Wright and Dame their joint deed of the property, to be signed by their wives. In consequence of this advice, Kendall required the joint deed of Wright and Dame to himself, with release of dower; and on the same 9th of July, Wright and Dame executed to Kendall their joint quitclaim deed of the premises, and referring to the mortgages to be assumed by said Kendall, and with covenants against themselves; which deed was acknowledged on the 10th of July, and recorded on the 8th of August following.

Immediately after the signing of this deed, the following declaration was made by Dame, and annexed to the agreement made between him and Wright, of the 7th of July 1835: "Having closed the above sale of the estate which I am authorized, by the above contract, to dispose of, and the purchaser thereof requiring the conveyance to be made jointly by myself and the abovenamed William Wright, and said Wright having this day joined me in the execution of a deed of release of said premises to H. S. Kendall; therefore, I agree that the execution of said deed by said Wright shall in no wise affect the above agreement or the agreement of September 29th 1829 therein referred to."

No settlement of this contract took place between Kendall and Dame according to the foregoing instrument; but on the 29th of September 1835, a new agreement was made between the said Kendall and Dame, in which, after referring to the agreement between them of July 9th, it went on to recite, that on the 5th of the preceding August, Kendall agreed to sell to said Dame an undivided half of said estate for \$85,000, with interest from the 9th of July 1835; and it then provided that Kendall should pay off and assume to himself said mortgages, and should also pay to Dame such further sum so that the sum total of said mortgages, and the sum to be paid, and the sum actually paid said Dame, should amount to one full half of the purchase money mentioned in the agreement of July 9th, and that the other half should not be paid, but should be applied to pay or offset the amount to be paid by said Dame for the amount of the

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purchase money, on buying back of said Kendall one half of said estate ; and said Kendall was to hold said undivided half in his hands, or the same should stand in his name, as belonging to said Dame, and to be transferred by said Kendall, with said Dame's consent, to the South Wharf Corporation, together with said Kendall's half of said estate ; and that said Kendall and Dame should be considered as equally interested in said estate : And each of them agreed with the other to pay over and sustain one moiety or half part of all expenditures and sums paid, or thereafter to be paid or incurred upon said estate, either before or after the same should be transferred to the South Wharf Corporation : And they further agreed to divide equally the net profits that might be made on said estate and property, resulting from the sale of the stock of said South Wharf Corporation, and that said agreement of the 9th day of July preceding should "be controlled and governed by the provisions herein contained."

No settlement having been made with Wright, he, growing uneasy in relation to the business, on the 6th of January 1836 commenced a suit at law against Dame upon the agreement of July 7th 1835 ; and on the 11th of said January summoned the said Kendall as his trustee, and perfected the service on Dame, on the 8th of April 1836.

About the middle of January, a movement was made for the organizing of the South Wharf Corporation, in which said Wright fully participated, and at that time made no intimation that the deed of himself and Dame to Kendall, of the 9th of July 1835, was placed in Dame's hands upon any trust or condition, or was so delivered to said Kendall ; and he was then knowing to Dame's agreement with Kendall to repurchase half the estate ; but it did not distinctly appear, from any evidence, that the instrument of September 29th 1835 was ever shown to him. Afterwards, on the 25th of January, it was agreed to organize the corporation and to give the legal notice for that purpose ; and on the 6th of February a meeting was held, at which were present the said Wright and Dame, E. Rhodes, the partner and agent or attorney of Kendall, and Messrs. Weld, Jones,

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Livermore and Morey. Wright presided, and Dame acted as secretary. The act was accepted, the board organized, three thousand shares were created and were subscribed for by Kendall, who took 2500; Livermore, 100; Jones, 100; Weld, 100; Morey, 20; Wright, 1; Dame, 1; and Rhodes, 178; and a vote was passed, (the substance of which was also made one of the by-laws or fundamental articles,) authorizing the purchase from Kendall of the premises; and it was left with Morey, as the clerk of the corporation, to agree on the terms of sale and to procure a deed — which was in accordance with Wright's wishes — and an assessment was laid of \$ 50 on each share of the company. Shortly afterwards a parol arrangement was made by Morey, on behalf of the corporation, with Kendall, for the price to be paid for the estate and the mode of payment; and \$175,000 was agreed upon as the amount of the purchase money, to be paid for by the corporation's assuming the mortgage of Dr. Shattuck, and by the application of the amount of the assessments laid on the 2678 shares subscribed for by Kendall and Rhodes; and as to the balance, it was to be paid in cash, or it might be necessary to lay a further assessment, or it might be thought expedient to give Kendall security: This was spoken of, but the precise course was left somewhat undetermined.

About the middle of February, Morey drew a deed of the premises, to be executed by Kendall to the corporation, and sent it to him at his residence in Brookline, he being in a feeble state of health and not able to come to Boston. The deed was duly signed and acknowledged about the middle of March, and delivered to Morey and placed among the papers of the corporation, but was not recorded till the succeeding July, and after the filing of the plaintiff's original bill and the service of the subpoenas upon the persons then made parties. On the 25th of February 1836, Dame settled his account with Kendall, in which he was credited with the purchase money of the estate, less Dr. Shattuck's mortgage and interest on the same from July 9th 1835, and charged back with one half the purchase money; and in the settlement he allowed \$20,000 to take up

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and cancel Thomas Kendall's obligation for one fifth part of the profits of the speculation, and also the several mortgages made to Cobb and the moneys advanced, &c. But no other papers were executed, showing Dame's interest in the estate, besides the agreement of September 29th 1835, and the account thus stated.

It further appears, that H. S. Kendall, though he purchased the estate in his own name, in fact bought for himself and partners, and afterwards, being in very feeble health, on or about the 1st of June 1836, he made a settlement of his partnership concerns with his partners, and sold out to two of them, Eben Rhodes and Charles L. Roberts, all his interest in the said Sea Street property, and a transfer was made to the firm of Freeman, Cobb & Co., on the books of the corporation, of the said 2678 shares in said corporation.

Afterwards, on or about the 9th of July 1836, the plaintiff's bill was filed and subpoenas issued, and in the fall of the same year the said Kendall died. From that time various proceedings have taken place; and the present defendants to the plaintiff's bill are the said Dame, Messrs. Rhodes and Roberts, constituting the firm of Freeman, Cobb & Co., the South Wharf Corporation, the executor of the said Kendall, and the widow of said Kendall, who afterwards intermarried with F. C. Whiston, and the said Whiston, and the minor children of said Kendall, who appear by the said Whiston, their guardian, and the said Jones, Weld and Livermore. Morey, having conveyed away his shares in the corporation before the corporation were made parties to the bill, is not one of the defendants, but is one of the principal witnesses in the case.

It appears by the answers of Weld, Jones and Livermore, that they were each induced to subscribe for 100 shares of the stock in the South Wharf Corporation, on the representation of said Kendall, or one of his partners, that said stock would probably prove profitable, and that either of them might, within a reasonable time after the corporation should be organized, transfer their shares to said Kendall or said Freeman, Cobb & Co.; and that they never paid any thing therefor, and have each since transferred 99 of their shares respectively, agreeably to the direction of said Freeman, Cobb & Co.

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The facts in this case spread over a large space, but the foregoing summary of them is sufficient to a proper understanding of the questions which are raised by the respective parties.

The bill sets forth, that said Kendall took the estate subject to and charged with the same trusts on which said Dame held it, in relation to said Wright's share of the purchase money, and that the sale was to be in such manner that the debts, liabilities and charges provided for, should be immediately extinguished, and said Wright at the same time be discharged and exonerated therefrom contemporaneously with the execution of said deed, and that Dame should receive the residue of the consideration in money or securities satisfactory to said Wright ; that the estate was to stand charged with such trust ; that it was not competent for the said Dame and Kendall to cancel and rescind the contracts of the 7th and 9th of July 1835, to the prejudice of the said Wright ; that if the partners of said Kendall, or said South Wharf Corporation, afterwards became purchasers of said property, they took it well knowing of the trust under which the said Dame and Kendall held the estate, and now hold it, and the said corporation became, by the purchase thereof, the trustees of said Wright, and are bound to fulfil the trusts and agreements under which said Dame held the estate, and to perform the agreement of sale first made between said Dame and Kendall, and to pay to said Wright the balance due to him : And the prayer of the bill is, that the said parties, Dame, Rhodes, Roberts and the South Wharf Corporation, &c. may be compelled specifically to perform the agreement of sale first made between said Kendall and Dame, and, after extinguishing the mortgages, liabilities, debts and charges provided for in the indentures of September 29th 1829 and July 7th 1835, to pay him one half the residue ; and that the parties may be restrained from alienating any part of said estate, until the execution of said agreement and the performance of said trusts ; and that the said estate may stand subject to and be charged with the performance of the same ; and that the equitable share and interest of said Dame in the stock in said corporation, and in its estate holden for him in trust, may be applied to and stand charged with the payment of

all such sums of money as said Wright may establish his title and claim to recover against said Dame ; and for such further and other relief in the premises, as the nature and circumstances of the case may require.

The defendant Dame admits that on a final settlement between him and Wright, according to the terms of the agreement of September 29th 1829, there will be a balance due to said Wright, which he is willing to pay ; but that it is a personal demand on him, and that the estate, by reason of the conveyance to Kendall by the joint deed of Wright and himself, is discharged of any and all trusts or liens thereon ; and the other parties, not disputing the personal liability of said Dame, deny the existence of any trust or lien on the said estate in any manner, or that the same is in any way, either as the property of the corporation or of individuals, held chargeable for the payment of any balance due from Dame to Wright.

The cause has been elaborately and ably argued by the learned counsel on each side. On the part of the plaintiff, it is contended that the trusts declared in his favor are a charge, either on the whole or a moiety of the estate : That Kendall took the estate under the trust and agreement to satisfy Wright as to the share of the purchase money which should be coming to him ; and that Kendall took it for himself and his partners ; and that the after agreement between Kendall and Dame was not a distinct operation, but that the agreement of July 9th and September 29th 1835 proves an originally joint operation between them, and that the joint deed of Wright and Dame to Kendall, of July 9th 1835, was not intended to alter the agreement as to Wright's security, but merely to enable Kendall to convey a perfect title to *bonâ fide* purchasers : But that if it was so intended, then there is created, by force of that conveyance, an implied trust or lien on the land for the unpaid part of the purchase money, in favor of Wright, which binds not only the estate in the hands of Kendall and his partners, but also in the hands of subsequent vendees having notice that the purchase money remains unpaid : 2 Story on Eq. § 1217 : That the South Wharf Corporation took it subject to such trust, because they are affected with notice and are

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in fact nothing more than Freeman, Cobb & Co. ; it being a mere change of the condition of the estate for its more profitable management : That Wright has done nothing to destroy his claim ; has not dealt with others or taken any security — and the trust going with the lands, he ought not to be barred of his claim.

On the other hand, the defendants contend, that the plaintiff and the defendant Dame, being tenants in common of the estate, the plaintiff, by his deed of September 29th 1829, conveyed the whole legal estate to Dame ; and that Kendall, by force of the joint deed of Wright and Dame, of July 9th 1835, took the estate discharged of all trusts ; that the very object of requiring such a deed was to free it from trusts and incumbrances, and that it was adequate to pass the trust estate and to convey a perfect title ; that the trust in Dame being to sell and convey, the purchaser was not bound to look to the appropriation ; that all trusts being thus cut off, Dame, by this agreement with Kendall, of September 29th 1835, took his interest in said estate, free of any trust ; that Wright's consent to the sale to the South Wharf Corporation was a waiver of any lien, if any existed ; and that no lien in behalf of the vendor, for the unpaid purchase money, existed at the time of making the conveyances, if it exists now, which is denied ; and that the corporation having acquired a perfect title, Wright's remedy is against Dame personally on his covenants, for any balance due him, and not on the estate.

The facts proved in this case afford satisfactory evidence, that the estates purchased by Wright, in the spring of 1827, were, by force of his deed to Dame, of May 1827, held by them as tenants in common, subject to the incumbrances to N. R. Cobb, or the firm of Freeman, Cobb & Co. These relations do not appear to have been changed until September 1829, at which time Wright conveyed all his legal interest in the estate (not otherwise expressly disposed of) to Dame ; and by a separate instrument, the trusts under which he held it were declared. In July 1835, a new instrument was executed between the parties, and a further declaration of trusts was made, so far as it respected the sale of the estate ; and this further agreement was evidently based upon the expectation of making a sale of the property to

Kendall, one of the firm of Freeman, Cobb & Co., and which very shortly afterwards took place. One of the trusts in this instrument is thus expressed: "And this authority" (that is, to sell the estate) "is given upon the express condition that said Dame shall appropriate the proceeds of such sale in the manner set forth in the agreement above alluded to, so far as to cancel the debts, demands and liabilities therein referred to; and the residue of said Wright's interest in said property, as secured to him by said agreement, shall, instead of a reconveyance of land, as therein provided for, *be paid to him by said Dame, in money or other satisfactory security, on demand.*" Of the nature and meaning of this clause there can be no doubt, so far as the surplus that might be coming to said Wright is concerned. With this agreement and authority in his hand, he concluded a contract with Kendall for a sale of the premises to him, for a sum authorized by said agreement. The instrument executed by Kendall and Dame contains these clauses—the first as it regards the title—namely: "Said Dame is to convey the same title and interest in said estate, which was conveyed to said Wright and him (said Dame and said Wright) by the persons before mentioned, by deed warranting against all persons claiming by, from or under him or said Wright; and all the water rights, wharves and privileges, except those herein before reserved, are to be fully conveyed." Here, it will be perceived, there is no stipulation for a deed from Wright. The other clause relates to the terms of payment: "Said Kendall hereby agrees to give said Dame, for said estate, the sum of \$ 170,005, payable as follows; to assume and pay said mortgages, and the balance, so far as one moiety thereof, to pay in cash or such security as shall be satisfactory to said Wright; and as to the balance, by notes and mortgages of said estate on demand, or for such time and times as shall be mutually agreed on, and on interest." This stipulation is a full recognition of Wright's beneficial interest in the premises; of his right to receive a portion of the purchase money, and to receive it in the manner provided for in his agreement, by virtue of which the sale is made; and an undertaking, on the part of Kendall, to satisfy Wright as to the manner of

this payment. And it is the declaration of a trust in behalf of Wright, which he could enforce against Kendall ; and a settlement with Dame in a mode not approved by Wright would not be binding upon him. He is a *cestui que trust*, and capable of maintaining a bill for the specific performance of the trust. But it appears that afterwards, though on the same day, an alteration was agreed upon as to the mode of conveyance and transfer of the estate to Kendall. He, by advice of his counsel, required a joint deed from Wright and Dame, with release of dower of the estate ; and his purpose in doing this, as testified to by the counsel, was to clear the estate from all trusts, liens and incumbrances of every sort whatever, so that he might have a clear and perfect title to the estate. But whether this purpose was disclosed to Wright, when the joint deed was required, does not distinctly appear. Whether this joint deed was required for any other purpose than to enable Kendall himself to pass a perfect title to a *bonâ fide* purchaser, or whether the object was not only that, but also to be relieved from all accountability to Wright himself for his share of the purchase money, is by no means free from doubt ; for Kendall had no claims, so far as appears, to enforce against Dame, towards which he could apply the purchase money, that did not exist also against Wright ; and Wright had received no consideration for releasing his lien on the real estate for the payment of that portion of the trust money that would be justly due to him on the settlement of the claims against him.

It has, however, been urged with great force of argument, by the defendants' counsel, that this joint deed was an absolute conveyance of the equitable estate of Wright, and was designed and intended to convey it, and that it was not required, nor was it needed, for any other purpose ; and that from the very nature of the existing trusts between Wright and Dame, Kendall necessarily took an estate, by virtue of that deed, discharged from all trusts whatever. But upon the view which we have taken of the case, it does not become necessary for us to decide as to the true intent and legal operation and effect of this deed ; and for the reasons which follow : It appears that this agreement of the 9th of July, between Dame and Kendall, was not carried into effect

agreeably to its terms and provisions ; and this, not from the fault or knowledge of Wright, but in consequence of another negotiation about the estate, between Dame and Kendall, in which Dame, acting for himself only, and not in behalf of Wright, treated Kendall as the owner ; premising here, however, that after making the joint deed aforesaid, Dame stipulated with Wright, that it should in no wise affect their agreements of July 7th 1835 and of September 27th 1829. This negotiation between Dame and Kendall is said to have commenced on or about the 5th of August 1835 — though from the answer of Dame it would appear that the subject had been started before — and related to the purchase by Dame of an undivided half part of the estate ; and it resulted in their agreement of September 29th 1835. This instrument, we think, fully recognizes the agreement of July 9th 1835, by reciting its provisions, and especially “as to the balance of said purchase money, so far as one moiety or half part thereof is concerned, to pay in cash or such security as should be satisfactory to one William Wright ;” and Kendall, after these recitals, stipulates that he “shall go on and pay off, or assume to himself, said mortgages, and shall also pay to said Dame such further sum, so that the amount of said mortgages, and the sum to be paid, and the sum actually paid said Dame, shall amount to one full half of the purchase money mentioned in the said agreement of July 9th 1835, and the other half,” &c. This, we are of opinion, is a full recognition of Wright’s beneficial interest in the purchase money, and a stipulation to provide for and pay the amount of the purchase money belonging to him, as provided for his benefit in the instrument of July 9th ; and the legal effect of it is, to revive the trust in behalf of Wright, if it was waived by the joint deed of Wright and Dame, and to confirm it, if it was not waived. So that the moiety of the estate becomes, by force of these instruments, charged with the payment of Wright’s share of the purchase money, after deducting the amounts due from him, agreeably to the agreement with Dame, as expressed on the 9th of July. Besides ; it may be said, that if this were not so, Dame might become the owner of the whole estate, subject to the mortgages, without having paid

one cent of the purchase money, or provided any security for the same, and thus turn Wright round to a mere personal claim against him. For if he could purchase out half the estate thus freed from the trust, he certainly could buy the other half in like manner. Being of opinion that the trust in behalf of Wright, for his unpaid share of the purchase money, was revived or confirmed by the instrument of September 29th 1835, the real inquiry is, has this trust been performed ; and if not, has it been waived and discharged by Wright ? That it has been performed is not pretended ; for he has only received, so far as the accounts show, about \$ 750 in money from Dame, since the 7th of July 1835. Whether it has been waived and discharged, depends on the character and legal operation of the transaction conveying the estate to the South Wharf Corporation.

The first mention in the papers, that I am aware of, in relation to the South Wharf Corporation, appears in the instrument of September 29th 1835, in which, speaking of Dame's undivided half of the estate, it provides, "that said Kendall shall hold said undivided half in his hands, or the same shall stand in his name as belonging to said Dame, and to be transferred by said Kendall, with said Dame's consent, to the South Wharf Corporation, together with said Kendall's half of the estate ;" and they are to be equally interested in the same, before or after the same shall be transferred to the South Wharf Corporation. It is obvious from this, that the intention to turn the estate into corporate property was a matter in contemplation between Dame and Kendall, and that the charter was to be used by them, if they thought best ; and, for aught that appears, without any special reference to Wright. Afterwards, with the consent of Wright, and with his coöperation as one of the two persons named in the act of incorporation, the company was organized. But though Wright took a share, it does not seem that it was for any other purpose than to give effect to the organization. Whether necessary for that purpose, or not, is here unimportant to be considered ; because he was not a subscriber for a large number of shares, as he must have been, if he had intended to participate in the enterprise.

We agree in the opinion, that if strangers to these transactions had become corporators, they would have held their interest free from any trust in favor of Wright, so far as any express trust existed in his favor. The act of Wright, in consenting to and aiding in the transfer of the estate, would have barred his claim, as against strangers. I speak now of the express trust. But we cannot shut our eyes in regard to this transaction, and consider the corporation as a stranger making a purchase of the estate ; but we feel called upon to look through the veil which the giving to the property a corporate form has thrown over the matter, in order to ascertain the rights and liabilities of these parties, as amongst themselves. And, in the first place, though the contract was made by Dame with Kendall alone, and in his name, yet the proofs clearly show that it was a partnership transaction, in which his partners were interested with himself ; and whatever their actual knowledge of the proceedings was, they had full means of knowledge, and they are affected with the knowledge of Kendall and bound by his proceedings as their copartner. In respect to Morey, he was acquainted with all the facts, and had therefore full notice of the situation of the parties, and no doubt subscribed for his shares in the full belief that the account of Wright and Dame would be amicably adjusted, and the whole business arranged between them. And in respect to the other subscribers for shares, Weld, Jones and Livermore, they were volunteers, paying nothing, and having, by previous understanding and agreement with Kendall or his copartners, a right to surrender their shares at their own pleasure, within a reasonable time, if they did not wish to continue ; so that they were either not entitled to notice, or were affected by the knowledge which Freeman, Cobb & Co. had of the whole transaction. Without discussing, therefore, the point raised, as to what is constructive notice to a corporation, we think, in this case, the corporation took the property with express notice of all material facts, and that the corporators interested in it had personal notice ; and that the corporation accordingly took the estate subject to the existing trust in favor of Wright ; for it stands in the place of Kendall, and is in truth nothing more than a legal form or mode of holding the estate on the part of Dame and Kendall.

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It has been argued, that the corporation has done certain acts and paid moneys, which place them in the condition of *bonâ fide* purchasers, by the employment of Morey, and by organizing and laying an assessment, &c. But in regard to this, we think these facts do not bear on the subject of the trust. The services rendered by Morey were in great measure performed for the organizing of the company, and must have been rendered to put the company in a situation to act, whether they made the purchase or not. And the act of drawing the deed to the corporation would rather be a charge against Kendall than to the corporation, as he was to convey the estate. But, in point of fact, the services of Morey were not a payment for shares subscribed by him, but an independent transaction ; and the supposed payment by Kendall, in the assessment laid on the shares, is merely recognizing the incumbrances on the estate as existing in that particular form.

That Wright was not conscious of his legal rights at the time, there can be little doubt, as he was silent with regard to any equitable claim or lien that he had on the estate ; but ignorance does not destroy them. *Barrell v. Joy*, 16 Mass. 221. That he meant to surrender his rights, or to look to Dame's personal responsibility alone for the money or securities due to him, cannot be admitted ; because, prior to the forming of the corporation, or taking active steps towards it, he, being uneasy about his demand, brought his action at law against Dame, and summoned Kendall as his trustee : Which fact he immediately communicated to Morey, and he was not required or asked to discontinue that suit ; and though it probably would not have bound the estate in the hands of the corporation, taking without notice of Wright's trust, yet it shows fully Wright's intention to have other security than the personal responsibility of Dame. This suit is said to be still pending. Whether Kendall ever answered, does not appear ; but I presume not, as an attempt, on the part of Wright, to take his deposition, failed on account of his feeble health. It has been argued by one of the counsel, that Wright, having commenced this suit, is bound to pursue his legal remedy against Dame, and that he cannot prosecute this till But that suit has not been pleaded in bar to this ; the par-

ties are not the same ; and at most, we think Wright can only be put to his election. It is not necessary, however, now to decide whether he is bound to do it or not.

It has been argued by the counsel of the plaintiff, that if the trust in his favor was discharged by his joint deed with Dame to Kendall, and he should be considered in the mere light of a joint vendor of the estate ; even then he would have a lien on the estate for his unpaid portion of the purchase money, in the nature of an implied trust, and that this trust could not only be enforced against Kendall, but against the corporation, as purchasers with notice. The existence of such a lien, in this Commonwealth, is denied by the counsel on the other side, or at least as not existing in favor of this plaintiff, because the deed under which he would seek to enforce it was made prior to the revised statutes, and therefore no such lien was in contemplation between the parties and cannot be enforced. But though I have carefully considered this point, and the various authorities on the subject, both English and American, I do not feel called upon to give an opinion upon it in this case ; because the court think the express trust, created in favor of Wright, still continues.

A doubt has been raised, whether the bill is properly framed to meet the plaintiff's case. But it seeks a specific performance of the agreements made between these parties, which necessarily involves the statement of the account with Dame ; and it also asks for general relief ; so that, if the special relief asked for is not properly set forth, still, under the prayer for general relief, it may be afforded, because it will be in conformity to the case made by the bill.

In coming to this decision, which we have not done without difficulty, we do not perceive that it will work injustice to either party. Wright has not been paid nor settled with, and the corporation have in fact paid nothing.

The defendant Dame himself was willing, as we understood, that his shares in the corporation should stand bound for the balance due from him ; and we decide, that instead of those shares, one moiety of the real estate shall stand so charged.

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In conformity with this opinion, the cause must be sent to a master to state the account between Wright and Dame. In doing this, it will be understood that the settlement between Dame and Kendall is not conclusive upon Wright, as he was not a party to it ; and for the balance due to Wright, after ascertaining the same agreeably to the provisions contained in the agreements of September 29th 1829 and July 7th 1835, the moiety of the estate is to stand charged for the security of it.

CHARLES M. BRIGGS *vs.* MOSES CALL.

Where one tenant in common of a vessel, who has authority to insure for his cotenant, effects insurance in his own name, for whom it may concern, and, after a loss, makes an adjustment with the underwriters, by receiving the amount of his own loss only, "in full of all losses on the policy ;" though he may be liable to the cotenant, in an action on the case, for the full amount of his loss, yet the cotenant may waive his right thus to recover the full amount of his loss, may adopt the adjustment made with the underwriters, and recover of the other tenant in common, in an action for money had and received, his share of the money received by such tenant: Or he may set off his share of the money so received, in an action *ex contractu* brought against him by the other tenant in common.

ASSUMPSIT to recover \$ 193.54, part of the expense of repairing the brig Nile.

At the trial in the court of common pleas, before *Warren, J.* the defendant did not deny the plaintiff's claim ; but he filed an account in offset, amounting to \$ 215.65. One item of this account was, " money received by said Briggs to the use of said Call, upon a policy of insurance on the freight of the brig Nile, effected at the Fishing Insurance Company's office, about August 13th 1840, being three eighths of \$ 375, viz. \$ 140.62." The plaintiff contested this item only.

It was admitted, that in August 1840, the plaintiff owned three eighths of the brig Nile, the defendant three eighths, Griggs & Chickering one eighth, and J. Milligan one eighth : That the brig was then at Attakapas (La.), under the command of said Milligan, who had taken her upon shares, and had engaged a freight, to the amount of \$ 1200, for Portsmouth,

N. H. : That on the 13th of said August, the plaintiff (being then ship's husband) caused insurance on said freight to be effected at the office of the Fishing Insurance Company, for the benefit of whom it might concern ; and that said brig and freight were totally lost, in the same month.

It was also admitted, that the plaintiff afterwards claimed of the underwriters the amount insured as aforesaid, and that they declined paying any thing upon the defendant's interest, on the ground that the plaintiff had no authority to insure that interest, and therefore the policy did not cover it.

On the 12th of October 1840, the plaintiff made an adjustment of the loss, with the underwriters, received \$ 975, less the premium, viz. \$ 944.75, and gave them a receipt in these words : " Received from the Fishing Insurance Company nine hundred and seventy-five dollars, in full for all losses on the within policy. C. M. Briggs."

" Captain's interest, \$ 600, being one half of charter. C. M. Briggs, \$ 375, five eighths of vessel represented by him. \$ 975. Premium note, \$ 37. Less three eighths, or \$ 225 — \$ 6.75. \$ 30.25 — \$ 944.75."

The defendant claimed three eighths of the sum thus received by the plaintiff, on account of the owners' share of said freight, and offered evidence tending to show, that before the plaintiff effected said insurance, he had authority from the defendant to insure his interest in the freight, and that his interest, therefore, was covered by the policy. And the jury were instructed, that if they were satisfied of this fact, they should allow this item in the defendant's account filed in offset, and return a verdict for the defendant for the balance thus found to be due to him ; which the jury accordingly did. The plaintiff thereupon alleged exceptions to said instruction.

C. T. Russell, for the plaintiff.

Welch, for the defendant.

HUBBARD, J. It appears by the facts in this case, that the plaintiff, being authorized to insure the defendant's interest in the freight of the brig Nile, did effect insurance on the whole freight, for the benefit of whom it might concern : and that a loss imme-

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mediately after taking place, he undertook to settle, and did settle it with the company who made the insurance.

The authority of an agent to effect insurance carries with it the right to adjust and settle the loss arising under the policy, while the authority remains unrevoked, and, as a duty connected with such authority, he is bound, in the event of a loss, to apply to the underwriters for payment, and is responsible for his neglect, if any injury is sustained by reason of it. *Richardson v. Anderson*, 1 Campb. 43, *note*. *Power v. Butcher*, 10 Barn. & Cres. 329.

The plaintiff did not receive the full amount of the insurance, but the defendant adopts the settlement made by him and claims his share of the loss, agreeably to such settlement; and he is entitled, we think, to receive it, unless the defence set up by the plaintiff presents a valid objection to his recovery. The plaintiff insists that he did not receive from the underwriters the defendant's share of the insurance, and that the defendant's remedy is against the company; and it appears by the facts admitted, that when he claimed payment of the loss, the office declined paying any thing upon the defendant's interest, on the ground that the plaintiff had no authority to insure the defendant's share. And the plaintiff, yielding to this objection, adjusted the loss and received a sum which in amount excluded the defendant's interest. But the receipt given and written on the back of the record was "in full for all losses on the within policy." The plaintiff contends that the receipt only binds himself and those for whom he professed to act, and that it does not prevent the defendant from recovering his share of the loss from the company. And many authorities have been cited to prove that a receipt is nothing more than an admission of money received, and may be explained and varied by parol evidence. The cases certainly are numerous to establish the position that receipts are merely *prima facie* evidence of the payment of money, and are open to explanation, and may be varied and controlled by other evidence. *Stratton v. Rastall*, 2 T. R. 366. *Lampon v. Corke*, 5 Barn. & Ald. 612. *Graves v. Key*, 3 Barn. & Adolph. 313. *Stackpole v. Arnold*, 11 Mass. 27. *Wilkinson v. Scott*, 17 Mass. 257. *Brooks v. White*, 2 Met. 283.

But in the present case, this is not a simple receipt for money. It is the adjustment and settlement of the loss claimed under the contract. It is not only an admission, in its terms, as a receipt in full for all losses on the policy, but it sets out the specific interest insured and deducts the return premium for the amount short insured ; thus adjusting the loss by the plaintiff's allowing that the defendant's interest was not covered by the policy. And it is well settled, that an adjustment of a loss, made in good faith, will not be set aside, unless upon satisfactory evidence of its having been made under a mistake of facts not known at the time. *Harden v. Gordon*, 2 Mason, 561, 562. Why the defendant's interest was stricken out as not being insured by the policy, we cannot say ; nor are we called upon to decide whether the underwriters, in consequence of the settlement, are absolutely discharged from any further claim that may be made upon them by the plaintiff, in his own name, or in that of the defendant — they being no parties to this suit.

But we do not think it either necessary or right to turn the defendant round to make his claim upon the company, as in consequence of the plaintiff's conduct he might be unable to present even a *prima facie* case, without the testimony, and consequent release of the plaintiff ; and he would thus be called upon to put his demand against the plaintiff, which we consider just, at hazard.

It has been argued, that if the defendant has a claim upon the plaintiff, his remedy is by an action on the case for the damage sustained by the neglect of the plaintiff ; and that assumpsit for money had and received will not lie. But we are of opinion that the defendant, being entitled to look to the plaintiff for payment of his loss, may, if he pleases, waive his right to demand the whole amount which he might recover in an action on the case, and claim his share or proportion of the sum actually received by the plaintiff ; and for such proportion assumpsit will lie — the plaintiff having received the money. The claim of the defendant, as made by him, being founded on contract, can, by virtue of the Rev. Sts. c. 96, §§ 2, 3, be set off against the plaintiff's demand

Exceptions overruled.

JAMES BRIEN vs. THE COMMONWEALTH.

The *St.* of 1843, c. 7, which enacts that "all the duties, required by law to be performed by the judge of the municipal court, shall be performed by the justices of the court of common pleas, or by some one of them," is not repugnant to the constitution of the Commonwealth.

The office of judge of the municipal court was virtually abolished by the *St.* of 1843, c. 7, which transferred its duties to the court of common pleas.

WRIT OF ERROR to reverse a judgment of the municipal court. It appeared from the record, that the plaintiff in error was found guilty, at the January term of said court, 1843, on an indictment which charged him with uttering a forged bank bill as true, knowing it to be forged; that said indictment was thereupon continued for sentence, until the succeeding February term of said court, and from said February term was continued until the succeeding March term of said court; and that, at said March term—the Honorable John M. Williams, chief justice of the court of common pleas, sitting as judge of said municipal court, by virtue of a certain law of this Commonwealth, entitled "an act relating to the court of common pleas and the municipal court of the city of Boston," approved by the Governor on the first day of March 1843—the plaintiff in error was sentenced to solitary imprisonment and confinement at hard labor in the state prison.*

* The Hon. PETER O. THACHER, Judge of the Municipal Court of the city of Boston, died on the 22d of February 1843.

The legislature passed an act, which took effect on the 1st of March 1843, the first section of which was in these words: All the duties, now required by law to be performed by the judge of the municipal court of the city of Boston, shall hereafter be performed within and for the county of Suffolk by the justices of the court of common pleas, or by some one of them: Provided, however, that no one of said justices shall hold more than three monthly terms of said municipal court in succession. There were also the following provisions in said act: Sect. 2. The records of the said municipal court are to be kept separate and distinct from those of the court of common pleas. Sect. 3. The name, style and caption of the said municipal court, and its powers, duties and jurisdiction shall continue the same as now prescribed by law. Sect. 5. All suits, processes, indictments, &c. now pending or before said municipal court, shall have day, and be heard and acted upon by one of the said justices of the court of common pleas, sitting as aforesaid as judge of said municipal court. Sect. 7. All precepts, &c. issued

The assignment of errors was thus : " That said judgment was rendered *coram non judice*; before one not legally constituted judge of the municipal court : That the chief justice of the court of common pleas, John M. Williams, one of the justices of said court, sitting as judge of the municipal court of the city of Boston, had no authority, by virtue of his said office of judge of the court of common pleas, to award the judgment in question ; because, by force of the revised statutes and the laws heretofore passed, the municipal court of the city of Boston has jurisdiction, exclusive of the court of common pleas, of all crimes and offences within the county of Suffolk : That the said John M. Williams, one of the justices of the court of common pleas, had no authority to award the judgment in question, under color of the office of judge of the municipal court of the city of Boston ; because the constitution of the Commonwealth expressly forbids a judge of the court of common pleas to hold any other office, except that of justice of the peace or a militia office : That the said John M. Williams, even if he were not a judge of the court of common pleas at the time of awarding said judgment, yet could not exercise the functions of judge of the municipal court of the city of Boston by virtue of the statute in the record referred to and alleged to be the ground of his authority ; because the constitution of the Commonwealth requires the appointment of all judicial officers to be made by the governor, by and with the advice and consent of the council."

G. Bemis, for the plaintiff in error. A writ of error is the proper process to relieve the prisoner, though the judgment is void on its face. *Bac. Ab. Error, A. Striker v. Mott*, and *Starr v. Trustees of Rochester*, 6 Wend. 465, 564. *The People v. Tracy*, 9 Wend. 265. 1 Chit. Crim. Law, 743, 752. The prisoner could not be relieved by writ of *habeas corpus*. *Riley's case*, 2 Pick. 172. Rev. Sts. c. 111, § 2.

Can the judgment in this case be upheld as the judgment of a court *de facto* ? There are cases which seem to favor this doc-

from said municipal court shall be tested like similar processes from the court of common pleas, and shall be under the seal of the municipal court, and signed by its clerk.

trine. 2 T. R. 87, per Buller, J. *Commonwealth v. Fowler*, 10 Mass. 301. *Fowler v. Bebee*, 9 Mass. 231. But it is submitted, that by the better reason, and also by the preponderance of authority, where the record shows that a judge was unconstitutionally appointed, and has no jurisdiction, his judgments may be reversed on error. See *The People v. White*, 22 Wend. 167 : 24 Wend. 541, 566. *The People v. Mayor, &c. of New York*, 25 Wend. 1. *The People v. Colt*, 3 Hill, 432. *Smith v. Normant*, 5 Yerg. 271. *Frame v. Trebble*, and *Hildreth v. McIntire*, 1 J. J. Marsh. 205, 206. 1 U. S. Digest, Courts, 65. And a party may go behind the record to show a want of jurisdiction. *Rex v. Verelst*, 3 Campb. 432. *Hopkins v. Menderback*, 5 Johns. 234. *The State v. Hayward*, 1 Nott & McCord, 547. *Commonwealth v. White*, 8 Pick. 454.

The judge who sentenced the plaintiff in error had no jurisdiction, as judge of the court of common pleas. The state constitution, Part II. c. 2, § 1, art. 9, requires that all judicial officers shall be nominated and appointed by the governor, by and with the advice and consent of the council. And the 8th article of amendment forbids the judges of the court of common pleas to hold any other state office, except that of justice of the peace and militia offices. But *St. 1843, c. 7, § 1*, (under which jurisdiction was assumed in this case,) enacts that all the duties of the judge of the municipal court shall be performed by the justices of the common pleas, or some one of them. The municipal court, however, still exists, and, by § 3, its powers, duties and jurisdiction are continued. The office of judge of the municipal court still exists, and, if filled by a judge of the common pleas, is unconstitutionally filled. Or if that office is by implication abolished, yet the judge of the common pleas had no authority, *virtute officii*, to award the sentence in question.

What is the "jurisdiction" of the municipal court, which the statute declares shall "continue the same as now prescribed by law"? By *Rev. Sts. c. 81, § 17 ; c. 82, §§ 25, 34 ; and c. 86, § 4* ; that court has jurisdiction, concurrently with the supreme judicial court, of all offences, not capital, committed in this county. This jurisdiction is exclusive of that of the com

mon pleas ; and as to the matter of jurisdiction, the legislature might have ordered any man in the Commonwealth to perform the duties of the judge of the municipal court, as rightfully as they have ordered the justices of the common pleas to perform them.

The office of judge of the municipal court still exists, and the governor may appoint a successor to the late incumbent. The Rev. Sts. c. 86, § 1, direct, that when a vacancy occurs in that office, it shall be filled. This direction is not repealed by St. 1843, c. 7, nor is the office thereby abolished. Its duties are required to be performed by others. But the functions of an office may be transferred, and yet the office remain. *Hoke v. Henderson*, 4 Dev. 26. *Ex parte U. States*, 1 Gallis. 338. *Runnels v. The State*, Walker, 146. See also 3 Bl. Com. 23, 25. *Dunn v. The State*, 2 Pike, 251. *Cohen v. Hoff*, 2 Const. Rep. (S. C.) 657. *The People v. Kane*, 23 Wend. 414. *U. States v. Clark*, 1 Gallis. 499. 5 Yerg. and 1 J. J. Marsh. *ubi sup.* These cases, and that in 25 Wend. 1, also show that the legislature cannot, directly or indirectly, appoint a judge. See also *Jarman v. Patterson*, 7 Monr. 649.

If the judges of the common pleas had accepted the office of judge of the municipal court, they would thereby have resigned or vacated the office of judges of the common pleas, and thus have incapacitated themselves to perform the duties of municipal judge. For it is only as judges of the common pleas, that they are required to do those duties. *Milward v. Thatcher*, and *The King v. Puteman*, 2 T. R. 81, 777. *The King v. Hughes*, 8 Dowl. & Ryl. 708. *The King v. Tizzard*, 9 Barn. & Cres. 418. *Amory v. Justices of Gloucester*, 2 Virg. Cas. 523. *The State v. Hutt*, 2 Pike, 282.

Would a statute be constitutional, which should require the judges of the common pleas to perform the duties of judges of probate? Or that they should perform, in rotation, the duties of one of the judges of the supreme judicial court?

S. D. Parker, for the Commonwealth. The St. of 1843, c. 7, repealed, by necessary implication, all former laws concerning the office of judge of the municipal court. See *Pease v. Whit-*

ney, 5 Mass. 382. *Bartlet v. King*, 12 Mass. 545. *Haynes v. Jenks*, 2 Pick. 181. *Nichols v. Squire*, 5 Pick. 168. *Commonwealth v. Cooley*, 10 Pick. 39.

By the constitution, Part II. c. 1, § 1, art. 3 and 4, the legislature has authority to constitute judicatories for the hearing and trying of all matters, criminal and civil, and to set forth the duties, powers and limits of officers, civil and military. And there are numerous statutes, transferring judicial power from one officer to another. By *St.* 1821, c. 109, all the judicial authority of justices of the peace for the county of Suffolk was conferred on the justices' court for that county; and this statute was adjudged to be constitutional. *Wales v. Belcher*, 3 Pick. 508. By *St.* 1799, c. 81, the criminal jurisdiction of the court of sessions in Suffolk was transferred to the municipal court; and by *St.* 1812, c. 133, jurisdiction of all offences not capital was given to the latter court, concurrently with the supreme court. By *St.* 1803, c. 154, and 1809, c. 18, the powers and duties of the courts of sessions were transferred to the court of common pleas. By *St.* 1813, c. 173, the powers and duties of the circuit court of common pleas within this county were conferred upon the Boston court of common pleas. By *St.* 1820, c. 79, the circuit and Boston courts of common pleas were abolished, and the present court substituted. The *St.* of 1827, c. 118, authorized the municipal court to award the additional punishments which, by *St.* 1817, c. 176, were to be awarded by the supreme court. And numerous other statutes might be cited, to show the exercise, by the legislature, of their authority to modify the subordinate courts, and transfer their powers and duties, as the public good has seemed to require. And none of them have been held to be unconstitutional.

The objection, that the legislature cannot appoint a judge, is no more applicable to the case at bar, than to the cases in which the judges of the common pleas were required by statute to perform the duties of the court of sessions. Yet it has been decided that those judges had jurisdiction of offences formerly cognizable by the court of sessions. *Commonwealth v. Holmes*, 17 Mass. 336. *Commonwealth v. White*, 8 Pick. 454.

But if the office of judge of the municipal court still exists, (which is denied,) yet the legislature might give concurrent authority to the judges of the common pleas; and the judge who first takes cognizance—as Williams, C. J. did in this instance—will have exclusive cognizance. *Stearns v. Stearns*, 16 Mass. 171. *The State v. Yarbrough*, 1 Hawks, 78. *Smith v. McIver*, 9 Wheat. 532. *The Robert Fulton*, Paine, 621.

Nor do the judges of the common pleas now hold two offices. They are judges of one court only, and act as such; though, by an anomaly, the name, seal, &c. of the municipal court are retained.

DEWEY, J. The plaintiff in error seeks to vacate the judgment rendered against him, upon the ground that the presiding judge had no authority to act in the matter. The case, it will be perceived, presents the very grave question, whether the justices of the court of common pleas can perform the duties and exercise the functions in criminal matters, in the county of Suffolk, that have heretofore been discharged by the judge of the municipal court of the city of Boston.

The St. of 1843, c. 7, § 1, provides, that “all the duties, now required by law to be performed by the judge of the municipal court of the city of Boston, shall hereafter be performed, within and for the county of Suffolk, by the justices of the court of common pleas, or some one of them.” Sect. 5 further provides, that “all indictments, now pending or before said municipal court, shall be heard and acted upon by one of the justices of the court of common pleas sitting as aforesaid as judge of said municipal court.”

The legislature have by this statute, in terms, authorized the jurisdiction assumed in the present case; and the only inquiry is, whether this enactment is in violation of any of the provisions of the constitution of the Commonwealth.

That the legislature have full power to change the criminal jurisdiction, and transfer the same from one court to another, is not denied. Great and important changes in this respect have been made from time to time, and particularly by St. 1812, c. 133, which gave enlarged jurisdiction to the municipal court, and

by *St.* 1832, c. 130, which vested in the court of common pleas original jurisdiction of all offences of which the supreme judicial court previously had jurisdiction, except crimes punishable with death.

But it is contended, that although it might be fully competent to the legislature to transfer to the justices of the court of common pleas the entire criminal jurisdiction throughout the Commonwealth, yet the duties must nevertheless be performed by such justices, under the name and style of justices of the court of common pleas. It is said that if jurisdiction is conferred upon them by force of *St.* 1843, c. 7, it is by making them judges of the municipal court, and thus conferring upon them a new office, in violation of the provisions of the eighth article of amendment of the constitution of the Commonwealth, which is in these words: "Judges of the court of common pleas shall hold no other office under the government of this Commonwealth, the office of justice of the peace and militia offices excepted."

This leads to the inquiry, whether the justices of the court of common pleas do in fact, by force of the statute under consideration, hold an office additional to that of judges of the common pleas? The office, if any such has been conferred upon them, is a judicial office; but a new judicial office could only be conferred by a commission from the governor, upon a nomination made by him and approved by the council, in the manner prescribed by the constitution. The legislature, by an ordinary legislative act, cannot appoint judicial officers. They may create judicial offices, leaving them to be filled by appointments made pursuant to the constitution. In fact, therefore, the only judicial office held by the presiding judge at the time of the rendition of the judgment, and the awarding of the sentence now sought to be reversed by this writ of error, was that of chief justice of the court of common pleas.

From this view of the case, it clearly results, that the constitutional objection, supposed to arise from the provision that the judges of the court of common pleas shall hold no other office, does not in fact exist here.

The ground of objection to the jurisdiction exercised by the

court of common pleas, which is more relied upon, is, that the municipal court of the city of Boston is still in existence, as a separate judicial tribunal, having criminal jurisdiction, and, as such, should have its presiding judge, regularly appointed and commissioned as municipal judge. If this position can be maintained, of course this judgment and award of sentence was without authority of law, and ought to be reversed.

In looking at the various provisions of *St.* 1843, c. 7, some of them will be found to be indicative of a purpose to continue, to some extent, a municipal court. By §§ 3 and 7, the name, style and caption are retained, and all precepts are to be under the seal of the municipal court. These provisions present objections which, though not insuperable, yet are certainly entitled to some consideration. They do, to some extent, seem to indicate a separate court, distinct from and independent of the court of common pleas.* But when we find that all the duties, required by law to be performed by the judge of the municipal court, are, by the very terms of the act, § 1, required hereafter to be performed by the justices of the court of common pleas, or by some one of them, we may properly consider whether these provisions as to the name, style and seal of the court, may not be reconciled with the general object and purpose of the act, and thereby avoid a construction which would render the whole act nugatory.

The principle of exercising the criminal jurisdiction of the court of common pleas, distinct from its duties in civil suits, has been long known in practice. In some of the larger counties, distinct terms are by law established for the criminal business of that court; and at the terms established for either civil or criminal business, the court has no jurisdiction over cases of a different character. At the terms for criminal business, they are judges in criminal cases exclusively; as much so as when sitting to do the duties of judge in the municipal court in the city of Boston. See *Rev. Sts.* c. 82, §§ 41-43. *St.* 1839, c. 117.

Now it seems to us, that the provisions above alluded to, and

* By *St.* 1844, c. 44, § 2, it is enacted, that "the seal of the said municipal court shall in all cases be the same as that of the court of common pleas of said Commonwealth."

which are thought to present some objection to the criminal jurisdiction in the county of Suffolk, exercised by the court of common pleas, may fairly and reasonably be treated as provisions designed only to make the criminal jurisdiction of that court in the county of Suffolk distinct in its terms and places of sitting, in its records and all its proceedings, carrying out, substantially, the same provisions as now exist by law and in practice in the counties of Worcester and Middlesex, but in a form certainly not so free from objections, as are the acts regulating criminal trials in those counties. We think the *St.* of 1843, c. 7, must be understood and construed as a general and entire transfer to the court of common pleas of all criminal matters which had heretofore been cognizable by the judge of the municipal court; and therefore, if an appointment could now be made of a municipal judge, for the reason that the office has not been specially abrogated, yet the individual holding such office would exist, as a judge, in name only, and without any authority or jurisdiction. It seems, however, to result from the considerations we have suggested, that the office of judge of the municipal court was virtually abrogated by the act transferring its duties to the court of common pleas.

The result to which we have come is, therefore, that the act in question does not violate the constitutional provision contained in the amendments to the constitution, art. 8, and is not void for that cause: And as to the second point, that the act does abolish the office of judge of the municipal court, as a distinct and independent office, and transfers the jurisdiction of that court to the justices of the court of common pleas, separating all proceedings by the court of common pleas, in criminal matters, wholly from the civil jurisdiction exercised by that court in the county of Suffolk.

Judgment affirmed.

JOHN GOODNOW vs. CALVIN WILLARD.

The Rev. Sta. c. 90, did not make it the duty of an officer, who attaches real estate, to deposit in the clerk's office the writ, or a copy thereof, with the return of the attachment. That duty was first imposed on such officer by *St. 1838, c. 186*.

In an action against an officer, who had attached real estate before the passing of *St. 1838, c. 186*, for omitting to deposit in the clerk's office a copy of the writ, &c., within three days, whereby the attachment was lost, the mere fact that he deposited such copy, &c. in the clerk's office, on the sixth day after the attachment, is not evidence that he promised the attaching creditor to do it within three days.

After the revised statutes went into operation, and before the passing of *St. 1838, c. 186*, an officer was directed to "attach specially," without directions as to the property to be attached: He thereupon attached sufficient real estate; but the attachment was lost, in consequence of an omission to deposit a copy of the writ, &c. in the clerk's office, within three days. *Held*, that the officer had obeyed his directions, by attaching the real estate, and that he was not answerable to the creditor for the loss of the attachment, although there was sufficient personal property of the debtor, which might have been attached.

An officer is liable to an action for neglecting to return an execution according to the precept thereof, although the judgment creditor suffers no injury by such neglect.

THIS was an action of trespass upon the case against the sheriff of Worcester for an alleged default of Larkin Newton, one of his deputies, and was submitted to the court on the following statement of facts:

"On the 1st of May 1837, the plaintiff, then and still an inhabitant of Boston, sued out a writ against Lyman Stoddard, of Upton, in the county of Worcester. The writ was made by an attorney in Framingham, at the request of A. Ward, the plaintiff's agent, who delivered it to E. B. Fay; and said Fay delivered it to said Larkin Newton, (who then lived at Southborough, about twelve miles from the residence of said Stoddard,) on the evening of said 1st of May, and requested him to attend to it immediately, and Newton promised so to do. At nine o'clock, on that evening, Newton attached several parcels of real estate, as the property of Stoddard, as appears by his return on said writ.

"The plaintiff sent no other order or instruction to Newton, as to the service of the writ, than as above stated, except the indorsement on the writ, which was 'attach specially.' On the 6th of the same May, and not before, Newton left a copy of the writ

(save the declaration) with the clerk of the court of common pleas for the county of Worcester ; and his charges on the writ were as follows : 'Fees : Service, 50. Paid clerk, 25. Copy, 25. Travel to return writ, 1.20.'

"On said 1st of May, said Stoddard was owner of a large amount of real and personal estate, situate in the county of Worcester, and was in open possession thereof, and so remained until and upon the 5th of said May. Said property was open to attachment, and either the real or personal estate was much more than sufficient to satisfy the plaintiff's claim ; and said personal estate could have been readily attached by Newton, if he had made any attempt so to do ; and the claims of other creditors of Stoddard, of greater amount than that of the plaintiff, were secured and satisfied by attachments of Stoddard's real estate on the 3d of said May. On the 5th of said May, Stoddard transferred all his property to sundry persons.

"The plaintiff's writ aforesaid was made returnable to the court of common pleas for the county of Suffolk, on the first Tuesday of July 1837, and judgment was rendered for the plaintiff, on the last day of the July term of said court, 1838, viz. September 19th 1838, for \$ 593.07 and costs of suit. Execution issued on the judgment, October 13th 1838, and was committed to said Newton, within thirty days after the rendition of judgment, with instructions to levy the same.

"Ever since the rendition of said judgment, Stoddard has been insolvent, and has had no property which could be taken on writ or execution, and he has removed, with his family, to the Wisconsin Territory. The plaintiff's execution has been in no part paid or satisfied, and was not returned by said Newton, until December 1839 ; but no special request to return it was made to him by the plaintiff."

It was agreed, that if, on the foregoing statement, the plaintiff could, in the opinion of the court, maintain this action, judgment should be rendered in his favor ; otherwise, that he should be nonsuit.

A. H. Fiske, for the plaintiff.

Parsons, for the defendant.

DEWEY, J. The principal ground, upon which the plaintiff relies to recover substantial damages, has been fully considered and settled against him in the case of *Inhabitants of Cheshire v. Briggs*, 2 Met. 486, which was not decided until after the present action was commenced. The Rev. Sts. c. 90, did not make it the duty of the officer, serving a writ of attachment, to deposit the writ, or a copy thereof, in the clerk's office for a registration of the attachment; as was decided in the case referred to. That duty was first imposed by St. 1838, c. 186.

The plaintiff further contends, that upon the facts stated by the parties, it may be inferred that the officer serving the precept did undertake to deposit the writ, or a copy thereof, in the clerk's office in proper season to secure and render effectual the original attachment indorsed on the writ, and that having voluntarily assumed upon himself to perform this duty, the sheriff may be charged by reason of any neglect in that behalf. But the only evidence, relied on to show such undertaking, arises, from the fact, that the attaching officer did return a copy of the writ and attachment to the clerk's office on the sixth day after the service and attachment made by him on said writ. This fact seems to us, at most, only to authorize the inference, that the attaching officer undertook to return it on the sixth day. By reason of the transfer of the property of the debtor on the 5th of May, the expediency of giving as much effect as possible to the attachment made on the 1st of May became quite manifest; and with or without any request from the creditor, the officer might deem it expedient to deposit a copy of the writ in the office of the clerk, to avail what it might for the benefit of the creditor. Whether such an undertaking, as is attempted to be established, that is, an agreement of the attaching officer, a deputy sheriff, that he will file such copy of the writ in due season to render the original attachment effectual from its date, and a neglect to perform it (it being an act not required of him by law) would create any liability on the part of the sheriff, it is immaterial particularly to consider upon the facts here stated.*

It was further urged, that the attaching officer was guilty of

* But see *Waterhouse v. Waite*, 11 Mass. 210. *Tobey v. Leonard*, 15 Mass. 200.

neglect in not attaching personal property on the precept committed to him for service. But no directions were given to him to attach personal property. He was only directed to "attach specially." It is true, if he had adopted that mode of attachment, it would have relieved the creditor from the consequences of any laches in the matter of perfecting and perpetuating his attachment. But the direction of the creditor to attach specially was as much complied with, by making a sufficient attachment of real estate, as it would have been by an attachment of personal estate. Such attachment was made, and of sufficient property, and the creditor should have followed up his directions to the officer to attach property, by ascertaining what property was attached, and taking the necessary measures to render his attachment effectual.

The only default of the deputy, for which the defendant is responsible, is the neglect to make due return of the execution subsequently committed to him. Here was a neglect of duty, for which, although no actual damage is shown, the plaintiff is entitled to recover nominal damages. *Lafin v. Willard*, 16 Pick. 64.

GEORGE W. TALBOT vs. THOMAS CAIRNS.

It was alleged in a declaration, that the plaintiff and R. were partners, and that the defendant covenanted with them to furnish them with money to be used as capital in their partnership business; that the defendant did so furnish money, during a certain time, and afterwards, "maliciously intending and contriving to injure and ruin the plaintiff, and confederating and conspiring with said R. to injure and ruin the plaintiff in his business, and to break up said partnership, &c., refused any longer to furnish capital, according to his covenant, and brought a suit against said partners to recover the money furnished to them by him, and recovered judgment against them, took out execution, and caused their stock in trade to be sold on said execution, at a great sacrifice, to pay the same;" and that said R., in pursuance of said confederacy, had refused to join with the plaintiff in a suit against the defendant, for a breach of said covenant. *Held*, that the plaintiff, in order to maintain his action, must prove not only that the defendant had broken his covenant, but that he did so with the intent, and pursuant to the confederacy, as set forth in the declaration.

TRESPASS upon the case. The plaintiff alleged in his declaration, that on the 5th of September 1838, a partnership was

formed between him and Andrew Riley, for two years from that date ; that the defendant, on the same day, by an instrument under seal, covenanted with the plaintiff and said Riley, to furnish them with money, to be used by them as capital, to the amount of \$ 1500, during their said partnership ; that their partnership business was carried on, and the capital furnished accordingly, by the defendant, until December 4th 1839, when the defendant, maliciously intending and contriving to injure and ruin the plaintiff, and confederating and conspiring with said Riley to injure and ruin the plaintiff in his business, break up said partnership, remove the plaintiff therefrom, and establish said Riley alone in said business, refused any longer to furnish capital according to his said covenant, and brought a suit against said partners to recover the money furnished to them by him as capital, according to his said covenant, recovered judgment against them, took out execution thereon, and caused their stock in trade to be sold on said execution, at a great sacrifice, to pay the same ; and that said Riley, in pursuance of said confederacy, had refused to join the plaintiff in a suit against the defendant for breach of said covenant. Trial before *Dewey*, J. who thus reported the case :

The plaintiff, in opening the case, and in the course of the trial, contended that the averments in the declaration, respecting the intent and the confederacy, were merely surplusage, not necessary to be proved in order to maintain the action. But the jury were instructed, that the plaintiff could not maintain the action, unless he satisfied the jury that the defendant had broken his covenant, and that he did so with the intent and pursuant to the confederacy, as set forth in the declaration. The jury found a verdict for the defendant, subject to the opinion of the whole court, as to the said instruction.

Paine, for the plaintiff. It was not necessary, in order to maintain the action, to prove the covenant and also the intent with which the conspiracy was formed. *Richards v. Farnham*, 13 Pick. 456. In an action of tort, the plaintiff is entitled to recover, if he prove actionable matter. 1 Chit. Pl. (2d Amer. ed.) 372. The judgment recovered by the defendant against

the firm, and the execution thereof, were a breach of his covenant, which would have supported an action of covenant broken ; and the covenant was used by the plaintiff, at the trial, not as a ground of action, *per se*, but to rebut the defendant's defence. A tort, which is covenanted against, will support an action of tort, as well as of covenant. *Mast v. Goodson*, 3 Wils. 348. *Williamson v. Allison*, 2 East, 446. *Cunningham v. Kimball*, 7 Mass. 65. *Richards v. Killam*, 10 Mass. 247. *Bree v. Holbech*, 2 Doug. 654. *Stoyel v. Westcott*, and *Bulkley v. Storer*, 2 Day, 418, 531. *Burnett v. Lynch*, 5 Barn. & Cres. 607. *Kinlyside v. Thornton*, 2 W. Bl. 1111. *Leslie v. Wilson*, 3 Brod. & Bing. 171.

The acts done pursuant to the confederacy — including Riley's refusal to join in a suit against the defendant on the covenant — constitute a tort, without regard to the intent alleged. No action lies for a mere conspiracy, or for an act done in pursuance of an unlawful intent ; *Morgan v. Bliss*, 2 Mass. 112, and *Livermore v. Herschell*, 3 Pick. 36 ; but if a party sustain any damage from an act done in pursuance of the conspiracy and unlawful intent, he may maintain an action. *Patten v. Gurney*, 17 Mass. 186. *Adams v. Paige*, 7 Pick. 542. And in such case, the conspiracy is the gist of the action. *Lamb v. Stone*, 11 Pick. 536. See also 13 Pick. *ubi sup.* *Bailiffs of Tewksbury v. Diston*, 6 East, 460. *Griffith v. Ogle*, 1 Binn. 174.

The averment of the defendant's intent is immaterial, as there are sufficient averments in the declaration to show an actionable tort.

The refusal of Riley to join with the plaintiff in an action of covenant, entitles the plaintiff to proceed against the defendant in an action of tort. *Wilson v. Mower*, 5 Mass. 411, per Parsons, C. J.

B. R. Curtis, for the defendant. If the conspiracy and intent were stricken out of the declaration, no cause of action would be left. The suit and judgment therein mentioned could not be regarded as malicious, and therefore no cause of action could arise therefrom. It follows, therefore, that covenant is the only foundation of the action.

Where there is a common law duty, an action upon the case will sometimes lie for the violation thereof, though the party has entered into a covenant to perform that duty. The covenant is superadded. 2 Saund. 252, *note* (1). 5 Barn. & Cres. 607. 1 Leigh's Nisi Prius, 551. But an action on the case will not lie in all such cases. *Colvin v. Newberry*, cited in 6 Moore, 425. And where the covenant creates the obligation, as in the case at bar, a breach of it is the subject of an action of covenant only. 1 Chit. Pl. (6th Amer. ed.) 155.

The ground now taken by the plaintiff, viz. that the acts pursuant to the conspiracy constitute a tort, without regard to the alleged intent, is inconsistent with that which was taken at the trial ; so that a new trial should not be granted, though the new ground might be tenable.

The conspiracy, as it is alleged in the declaration, involves the intent, and a jury could not find the conspiracy without finding the intent. They might find the intent, without finding the conspiracy ; but that, as the plaintiff's counsel admits, would not maintain the action.

The dictum of Parsons, C. J. cited from 5 Mass. 411, means only, that where one of two covenantees or promisees refuses to join in prosecuting an action, he is liable *to the other* in an action on the case. So that dictum was understood by Morton, J. in 6 Pick. 323.

DEWEY, J. The real question raised upon this report is of a much more restricted character than might be supposed from the points suggested and discussed in the argument for the plaintiff. The simple question presented on the trial was, whether the allegations in the declaration, of the intent and confederacy of the defendant, were mere surplusage and needed not to be proved. The court ruled that they were material allegations, and that the mere breach of the covenant set out in the declaration was not sufficient to entitle the plaintiff to maintain the present action. No distinction was then taken by the counsel for the plaintiff, between the matter of the intent and of the confederacy, nor any suggestion made that they were to be treated as separate subjects. But the counsel now insists, that if there was an unlawful

confederacy, the action may be maintained without reference to the alleged intent and object of such confederacy.

The first answer to this position is, that no such instruction to the jury, nor ruling by the court, was asked or refused, during the course of the trial. In looking at the facts, as set forth in the report of the case, we do not perceive that any such distinction could have been usefully urged; inasmuch as the confederacy itself, and the intent and object of the confederacy, seem to be inseparably blended.

In an action upon the case for a tort, it is undoubtedly true, that if the substantial cause of action is shown by the evidence, although all that is charged in the declaration be not shown, yet the plaintiff will be entitled to a verdict. But that falls far short of establishing the position that the mere breach of a contract between A. & B. of the one part, and C. of the other part, will entitle A. to maintain an action upon the case in tort, in his own name alone. That something beyond this is necessary seems now to be conceded by the counsel for the plaintiff; and hence it is contended, that if the confederacy be shown, although unaccompanied by the intent charged, it would be sufficient to maintain this action.

Some authorities were cited, to show that an action upon the case will lie, in some instances, to recover damages where the substantial cause of action rests on contract: As an action upon the case on a warranty of goods sold: So for the disturbance of an easement, though acquired under a contract, and held under covenants for quiet enjoyment; in case the grantee is disturbed by the grantor. *Mast v. Goodson*, 3 Wils. 348. If the cause of action really arises upon contract, then, I apprehend, the suit must be between the contracting parties; as much so, when brought in case, as when brought in assumpsit. If it arises from a tort, which would subject the party to an action, independently of any privity of contract, then the fact, that the injured party has a cumulative remedy, by force of a contract, will not divest him of his right to an action upon the case.

It was also urged, that the allegation in the declaration, that Riley, one of the covenantees in the instrument executed by the

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defendant, had, in pursuance of the confederacy, refused to join in a suit against the defendant for breach of the covenant, would, if proved, authorize a verdict for the plaintiff. To sustain this position, the case of *Wilson v. Mower*, 5 Mass. 411, was cited; but, as it seems to us, it does not furnish the authority supposed. See *Eastman v. Wright*, 6 Pick. 323. But whether such action would lie, upon proof of a confederacy between the defendant and one of the covenantees to defeat an action on the covenant, it is unnecessary to decide; for the reasons already stated.

Judgment on the verdict.

LOTT POOL vs. HENRY B. LLOYD & others.

A. made a negotiable note to B., payable on demand, under an agreement that it should be placed in the hands of C. to be by him delivered to B. or returned to A., on certain conditions: B. fraudulently obtained possession of the note, and negotiated it six months after its date, and the indorsee brought a suit thereon against A., who thereupon filed a bill in equity, praying for an injunction and relief. *Held*, that the court had no jurisdiction in equity, and that A. had an adequate and complete remedy at law.

When a bill in equity seeks special and general relief, and also a discovery, and relief is the principal object, and discovery is sought merely as incidental to the relief, if the plaintiff shows no title to the relief sought, a demurrer lies to the whole bill.

THIS was a bill in equity, which set forth, in substance, the following facts: That on the 1st of June 1839, an oral agreement was made by and between the plaintiff and Henry B. Lloyd, one of the defendants, that the plaintiff should advance and lend to said Lloyd \$1426.50, to enable him to carry on the business of stable keeping in Boston, and that said Lloyd should cause certain real and personal property (viz. a stable and horses, and carriages and harnesses) to be conveyed absolutely to the plaintiff, as security for the money to be advanced and lent, which property the plaintiff was to hold as security for the payment of said money and interest thereon, and upon the secret trust to reconvey the same to said Lloyd, upon such payment being made by him: That in order to secure said Lloyd's rights,

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and to enable him to enforce said trust, it was further orally agreed by and between him and the plaintiff, that the plaintiff should make and sign a negotiable note for \$ 1426.50, payable to Samuel Cheney, on demand, who was to indorse the same (without recourse) to said Lloyd, and that said note should be placed in the hands and keeping of N. P. Russell, to hold in trust to deliver the same to the plaintiff upon said Lloyd's repaying said money, agreed to be advanced and lent as aforesaid, with interest thereon, and upon the plaintiff's thereupon conveying and transferring said real and personal property to said Lloyd ; or to deliver said note to said Lloyd, upon the plaintiff's failing to reconvey said property to him, upon his tender to the plaintiff of said money and interest thereon : That it was further agreed, that the plaintiff should appoint said Lloyd and Alexis Pool his joint attorneys and agents (the said Lloyd and Alexis having agreed to become partners in the business of stable keeping) to hold and manage the property aforesaid, upon their own risk and responsibility, and for their own profit ; the plaintiff to retain no interest in said business beyond the payment of the interest upon said sum of \$ 1426.50 : That on or about said 1st of June, Lloyd caused the property aforesaid to be conveyed to the plaintiff according to said agreement, and the plaintiff advanced and paid to Lloyd said sum of \$ 1426.50 ; appointed Lloyd and Alexis Pool his joint attorneys and agents ; made and signed his promissory note for \$ 1426.50, payable to said Samuel Cheney, or order, on demand, which note was indorsed in blank by said Cheney, and without recourse, and was placed and left in the hands of the counsel, who drew the conveyances of said property, to be by him delivered to said N. P. Russell, whenever said Russell's consent to hold the same, on the trusts aforesaid, should be obtained ; upon the express agreement that said note was in no way to be used or negotiated by said Lloyd or by any one else, until the plaintiff should fail to perform the stipulations aforesaid, upon which said property was transferred to him : That said Lloyd afterwards, without the consent or knowledge of the plaintiff, called upon the counsel, in whose hands said note then was, and stated to him that

the plaintiff had authorized and sent said Lloyd to obtain the note and place it in the hands of said Russell ; and that said counsel was induced, by such false and fraudulent representation, to deliver the note to Lloyd, and did deliver it to him, who, on the 27th of December 1839, sold, assigned and transferred the same to Robert Vinal and William Blanchard junior, (the two other defendants,) partners in business, in payment of a debt due from him to them, and for which the plaintiff was in no way responsible : That said Vinal and Blanchard were afterwards advised and informed of the foregoing matters, and particularly of the false and fraudulent manner in which said Lloyd procured said note, but that they nevertheless, on the day last mentioned, demanded payment of the note from the plaintiff, and on his refusal to pay it, they commenced a suit at law against him for a small sum due from him to them, and which he was always willing and ready to pay, and also to recover the amount of said note — which suit is still pending.

The plaintiff further averred, that the facts above set forth were material in the defence of said suit of Vinal and Blanchard against him, and that a discovery of them by the defendants was requisite to such defence, and that they could not be proved by other testimony. He therefore prayed that the three defendants might, upon their oaths, make full answers to all and singular the matters above set forth and charged, and to divers specific interrogatories inserted in the bill.

The plaintiff also prayed that an injunction might issue, restraining said Vinal and Blanchard from further prosecuting their suit aforesaid for the recovery of the amount of said note ; and that they might be ordered to give up said note to the plaintiff. The bill concluded with a prayer for such other and further relief as might to the court seem to be according to equity and good conscience.

The defendants demurred to the bill, and assigned, among other causes of demurrer, *first*, want of jurisdiction, and *secondly*, want of equity.

B. Rand, in support of the demurrer.

S. D. Parker, for the plaintiff.

SHAW, C. J. 1. The court are of opinion, that they have no jurisdiction, and that, upon that ground, the demurrer must be sustained. Though the equity jurisdiction of the court has been from time to time enlarged, it is still limited to particular subjects, and none of them are such as to embrace the plaintiff's case. It is said, that it is included under the head of equity, where goods, chattels, bonds, notes and the like, are taken, detained and secreted, so that they cannot be come at to be replevied. *St. 1823, c. 140, § 1. Rev. Sts. c. 81, § 8, clause 4th.* This manifestly extends to such notes as the plaintiff might maintain an action at law to recover, if they could be found so as to be replevied. The revised statutes are explicit, in describing them as taken and detained from the owner thereof. But in this case, the plaintiff can claim no property in the note, as a contract. Indeed the gravamen of his complaint is, that it is not in the hands of the depositary agreed upon by the parties. Nor does he aver, that he has performed the conditions on which it was to be held by such depositary and delivered back to him.

It is then said that the case comes under that head, which gives jurisdiction in equity, when there are more than two parties, having distinct rights or interests, which cannot be justly and definitively decided in one action. *Rev. Sts. c. 81, § 8, clause 6th.* But here are no such three or more parties, having distinct rights or interests. The defendants, Vinal and Blanchard, claim the note as indorsees of Lloyd; but Lloyd does not claim any interest in the note adversely to them. This clause in the statute manifestly applies to the case of more than two parties having such distinct interests, that a judgment between two of them would leave one or both open to a controversy with a third party; a case requiring proceedings in the nature of a bill of interpleader, where one decree would adjust the whole matter of controversy.

It was suggested, though apparently not much relied on, that here was a trust disclosed, upon which the court has jurisdiction. It is difficult to perceive how any trust exists, even as between the defendant Lloyd and the plaintiff. The only plausible ground is, that Lloyd obtained the note of the plaintiff's agent, for a

special purpose, and was therefore bound in conscience to hold it for the plaintiff's use. But by the statement in the bill, the counsel, with whom the note was left, had no authority to deliver it, and in doing so, was not the plaintiff's agent. And further; it is not from Lloyd, but from the defendants, Vinal and Blanchard, as indorsees and holders of the note, that the plaintiff seeks relief; and between them and the plaintiff there is no trust.

2. But upon another ground of demurrer, want of equity, we are of opinion, that this suit cannot be maintained. By the facts stated in the bill, the plaintiff has a perfect defence at law. The note was never delivered by him or by his authority, but obtained by misrepresentation, and fraudulently negotiated. Being a note payable on demand, made after *St.* 1839, c. 121, § 1, went into operation, any matter, which would be a good defence to a suit brought by the promisee, would be a good defence to a suit by the indorsee. Besides; the bill alleges that it was negotiated to the plaintiffs on the 27th of December 1839, at which time it must be regarded, upon general principles of law, independently of the statute, as a dishonored, overdue note, and taken by the indorsees subject to any defence, which might have been made to it, had the suit been commenced by their immediate indorser. The plaintiff, therefore, has a plain, adequate and complete remedy at law.

As the bill at present stands, special and general relief is sought, where relief is the principal object, and discovery is sought merely as incidental to such relief. In such case, if the plaintiff shows no title to the relief sought, a demurrer to the whole bill will lie. *Mitt. Pl.* (3d ed.) 149, 150. *Beames Eq. Pl.* 250. If the plaintiff seeks a discovery, merely in aid of his defence to a suit, commenced or threatened, he must shape his bill accordingly, either by the commencement of a new suit, or by amending his present bill, which can be done only on terms.

JOSEPH S. CHRISTIAN vs. THE COMMONWEALTH.

When a judgment in a criminal case is entire, and a writ of error is brought to reverse it, though it is erroneous in part only, it must be wholly reversed. The court, after reversing a judgment in a criminal case, cannot enter such judgment as the court below ought to have entered, nor remit the case to the court below for a new judgment. And this rule applies to a case where a sentence has been awarded, to take effect after the expiration of a former sentence, and the prisoner brings a writ of error to a hearing before the expiration of the former sentence.

WRIT OF ERROR. The defendant was convicted, in the court of common pleas, in the county of Bristol, March term, 1842, of stealing from a dwellinghouse property of less value than \$100, and was sentenced to two days' solitary imprisonment, and confinement afterwards at hard labor, for the term of eighteen months, in the state prison, to commence from and after the expiration of a former sentence of two days' solitary imprisonment, and two years' confinement at hard labor, awarded against him by the same court at the same term.

The error assigned was, that the indictment, on which the judgment was founded, set out no offence above simple larceny, and that the judgment was therefore excessive and illegal.

G. Bemis, for the plaintiff in error. As the indictment does not allege that the larceny was committed in the day-time, the prisoner could be sentenced only for a simple larceny, and not to more than one year's confinement. *Hopkins v. Commonwealth*, 3 Met. 460. A judgment void in part must be wholly reversed. This court cannot award a new sentence, nor send the case back to the court of common pleas for correction there. *Shepherd v. Commonwealth*, 2 Met. 419. *The Queen v. Hartnett*, Jebb's Cr. Cas. 302. *Stevens v. Commonwealth*, 4 Met. 371.

Austin, (Attorney General,) for the Commonwealth, admitted that the judgment was erroneous, but contended that, as the prisoner had not yet suffered any thing under the sentence, the case was different from any of those cited, and that the court might now, after reversing the judgment, enter such judgment as should have been entered in the court below.

SHAW, C. J. It was urged by the Attorney General, that this case is distinguishable from all former cases, in this particular, that in this case the convict has not yet suffered any thing from the erroneous judgment, as he has not yet completed his sentence under the first judgment. The term of imprisonment under the second sentence not having yet commenced, it is contended that the prisoner can now be sentenced, either in this court, or in the court of common pleas, and that on reversal of this judgment, such judgment may now be rendered as the court below should have rendered. But on the best consideration we can give it, we perceive no substantial ground to distinguish this from the former cases, where judgments have been reversed, in which it was held that no new judgment could be given by this court.

In the first place, it is very clear, and indeed it is conceded, that the judgment is erroneous in imposing a longer sentence, in a case of simple larceny, than the law would warrant. *Hopkins v. Commonwealth*, 3 Met. 460. The judgment, therefore, must be reversed.

What further can this court do? It has already been held, that it is not competent for the court to reverse in part where the judgment is entire, nor to enter up such judgment as the court below ought to have entered. The fact, that the convict has yet suffered no part of the sentence on the erroneous judgment, does not vary the case in principle. If one has suffered a part of the sentence awarded by an erroneous judgment, it may add weight to the reasons why a new judgment should not be pronounced, if it were a new and original question; but it is not the legal reason on which the rule rests, and that rule is now established by precedent and practice. *Shepherd v. Commonwealth*, 2 Met. 419. Whatever other remedy the Commonwealth may have, we think it is not competent for this court to call the party in and pronounce a new sentence, nor to remit the case to the court of common pleas.

Judgment reversed.

JOSEPH CARLTON vs. THE COMMONWEALTH.

Two or more distinct offences may be included in one indictment, in several counts, where the offences are of the same general nature, and where the mode of trial and the nature of the punishment are also the same.

When a defendant is found guilty, generally, on an indictment which charges him with several distinct offences, it is not necessary that separate sentences should be awarded. A single sentence is legal, if it do not exceed the sum of the several sentences which might be awarded.

When a defendant is found guilty, generally, on an indictment which charges him, in one count, with entering a dwellinghouse, in the night-time of a certain day, with intent to commit a larceny, and, in another count, with a larceny, on the same day, in the same dwellinghouse, and he is sentenced to a greater punishment than is warranted by law, either for such entry or for mere larceny in a dwellinghouse; the court cannot, on a writ of error, presume that one and the same offence only is charged in the indictment.

WRIT of error to reverse a judgment of the court of common pleas in the county of Middlesex, at the March term, 1838, sentencing the plaintiff in error to one day's solitary imprisonment, and confinement afterwards at hard labor, for the term of five years, in the state prison. The first count in the indictment, on which the prisoner was found guilty, alleged that he, at Cambridge, on the 24th of February 1838, "the dwellinghouse of Joel Reed there situate, in the night-time did enter without breaking, no person lawfully therein being then and there put in fear, with intent the goods and chattels of him the said Reed, then and there being found, feloniously to steal, take and carry away, in the dwellinghouse aforesaid." The second count alleged that the prisoner, on said 24th of February, at Cambridge "a certain camblet cloak, of the value of \$8, of the goods and chattels of Joel Reed, and one surtout coat, of the value of \$12, of the goods and chattels of Elias Phinney, then and there in the dwellinghouse of said Reed being found, feloniously did steal, take and carry away, in the dwellinghouse aforesaid." It was assigned for error, "that said judgment is excessive and illegal in the matter of the one day's solitary imprisonment."

G. Bemis, for the plaintiff in error. By Rev. Sts. c. 126, § 13, the offence charged in the first count is punishable "by imprisonment in the state prison, not more than five years," and

the addition of one day's solitary imprisonment renders the judgment erroneous, for the second count cannot be regarded as setting forth an offence distinct from that in the first count. *Stevens v. Commonwealth*, 4 Met. 360. *Commonwealth v. Hope*, 22 Pick. 1. But if this be not so, and if two distinct offences can be joined in one indictment, (which is not admitted,) yet the judgment is erroneous, it being a joint judgment for several offences. There should have been two several sentences. In *Rex v. Robinson*, 1 Mood. Cr. Cas. 413; Roscoe Crim. Ev. (2d Amer. ed.) 350; it was held that one judgment on a conviction of two separate offences of uttering counterfeit coin on the same day, was bad, and that there should have been consecutive judgments.

Austin, (Attorney General,) for the Commonwealth. As this record stands, two separate offences are charged; and the court cannot ascertain *abunde* that one only was intended to be charged. It has long been the practice, in this Commonwealth, to unite several distinct offences, of a similar nature, in one indictment; and a single judgment on the several offences violates no principle of law, and subjects the convict to no hardship or inconvenience. The case cited from Mood. Cr. Cas. turned upon the terms of the statute on which the indictment was framed, and is not applicable to the case at bar.

SHAW, C. J. It is insisted for the plaintiff in error, that for the burglary set forth in the indictment, he was not liable to a term of imprisonment exceeding, in the whole, five years. But there is a second count in the indictment, charging him with a simple larceny in stealing a cloak, and also a coat of Mr. Phinney. For this, if punishable as a separate offence the convict was liable to imprisonment not exceeding one year.

But it is contended that this second count cannot aid in sustaining this judgment, because, 1st. it is to be presumed that the breaking of the dwellinghouse and the stealing of the cloak and coat were all one offence, and could not be separately indicted and punished; 2d. because, if they were distinct substantive offences, they ought not to be included in the same indictment; and 3d, because, if they could be so included, there should have been separate sentences.

1. In the consideration of the question, whether a judgment is erroneous, we can only look at the record ; and by the record there are two distinct offences well charged, and found by the verdict, each punishable by imprisonment in the state prison. We cannot presume that they were one and the same offence, nor, though alleged to be on the same day, that they were done at the same time. We cannot say, judicially, that they are the same, though we might, if allowed to conjecture, incline to the belief that they were. But, if it is said that this is a technical ground and does not meet the justice of the case, it is answered, that the error assigned is of the small excess of one day to an imprisonment of five years warranted by law, and constitutes a very slight objection to the judgment, little affecting its merits.

2. We think it is common in practice, in this Commonwealth, and especially in the county of Suffolk, to include several distinct substantive offences in the same indictment, where they are of the same general nature, and where the mode of trial and the nature of the punishment are the same. And we see no objection to this course ; because it is always competent for the court to order — where there are several counts which might tend to perplex the defendant in his defence — that the prosecutor shall elect on which of the counts he will bring the defendant to trial, so as to exempt him from the vexation of meeting multifarious charges at one and the same time,

3. And we are of opinion, that it is not necessary, in such cases, to award separate sentences, where they are so far alike that the whole of the judgment is but the sum of the several sentences to which the convict is liable : As where the punishment is by fine, or by terms of imprisonment in the county jail, house of correction, or state prison.

On the whole, we are of opinion, that the one day, in addition to the term of five years' confinement at hard labor, was well warranted by law, and that there is no ground to reverse the judgment.

Judgment affirmed.

JOHN K. BOOTH vs. THE COMMONWEALTH.

Where a defendant is found guilty, generally, on an indictment which charges him with adultery, on three different days, with a woman of one name, and on a different day, with a woman of another name, and he is sentenced to a greater punishment than is warranted by law for a single act of adultery; the court cannot on a writ of error, presume that a single offence only was charged in the indictment.

WRIT of error to reverse a judgment of the court of common pleas in the county of Bristol, at the June term, 1841. The plaintiff in error was found guilty, at that term, on an indictment containing four counts, and charging him with adultery, on three different days, with a woman named P., and on another day, with a woman named W., and he was sentenced to one day's solitary imprisonment, and confinement afterwards at hard labor, for the term of three years, in the state prison. The assignment of error was, "that said judgment is excessive and illegal in the matter of the one day's solitary imprisonment."

G. Bemis, for the plaintiff in error.

Austin, (Attorney General,) for the Commonwealth.

SHAW, C. J. It is contended, that this judgment is to be deemed erroneous, because the whole indictment is to be considered as charging one offence of adultery, which subjected the convict to one punishment only, which, by Rev. Sts. c. 130, § 1, cannot exceed three years' imprisonment in the state prison; or, that the court are to presume that the grand jury intended to charge one fact of adultery, and that different days were laid, to meet the proof as it might come out, and that the same woman may have been intended, designating her by different names, to meet the proof. But, for the reasons stated in *Carlton v. Commonwealth*, (*ante*, p. 534,) we are of opinion that we cannot presume them to be charges of one offence only, but to be, what they purport to be, charges of several distinct offences; and being of the same nature, and subjecting the party to the same species of punishment, they might properly be included in one indictment. Under this aspect, it is very clear that the punishment awarded did not exceed that prescribed by law, and therefore that the judgment was not erroneous.

Judgment affirmed

COMMONWEALTH vs. HENRY G. TRACY & others

The provision of the Rev. Sta. c. 142, § 8, for the apprehension of persons charged with the commission of offences in other States, is not repugnant to the constitution or laws of the United States.

An averment, in an indictment for a riotous assault upon an officer in the lawful discharge of the duties of his office, that he was in the service of a legal precept, and had A. in his custody as a prisoner, to be examined on a charge of larceny, is supported by proof that the officer was in the service of a legal precept, and had A. in his custody as a prisoner, to be examined on a charge of larceny in another State, and of being a fugitive from justice.

An officer who has a legal warrant to arrest A., who is charged with larceny in another State, and with being a fugitive from justice, does not abuse the process, nor forfeit his protection under such warrant, by holding at the same time a power of attorney from one who claims the custody of A. as a fugitive slave, and is proceeding to carry him before the proper tribunal, to obtain a certificate according to the law of the United States.

On the trial of an indictment for a riotous assault upon an officer while serving a legal precept on A., who was charged with larceny in another State, and with being a fugitive from justice, the defendants cannot introduce evidence that B., who claimed the custody of A. as a fugitive slave, had declared, and that the officer knew B. had declared, that A. had not committed larceny, and that the charge was made merely for the purpose of getting A. into custody, so that he might the more easily be carried home.

HENRY G. TRACY, Francis Saunders, William Williams, Hamilton H. Smith and Robert Wood, were tried in the municipal court, at the November term, 1842, on an indictment which alleged that they, "together with divers others, to the number of 50 evil disposed persons," whose names were not known to the grand jury, "on the 20th of October 1842, in the night-time, at Boston, with force and arms, did unlawfully, riotously and routously assemble together to disturb the peace, and being so assembled, in and upon one Jonas Stratton, then and there one of the constables of the city of Boston, in the due and lawful discharge of the duties of his office of constable of said city, being in the service of a legal precept to him directed, and then and there having lawfully one George Latimer, otherwise called Albert Mason, in his custody as a prisoner, to be examined, on a charge of larceny, by the police court of said city, according to a certain lawful precept to him directed, and issued by said police court, under its seal, upon a com-

plaint made and sworn to, according to law, said police court then and there having lawful jurisdiction in the premises, and said Stratton then and there being in the peace of the Commonwealth, an assault did make, unlawfully, riotously and routously, and him the said Stratton did then and there unlawfully, &c. beat, wound and evil treat, and resist, hinder and obstruct him in the discharge of the duties of his office of constable, and unlawfully, riotously, &c. did attempt to rescue said Latimer from the custody of said Stratton, and set him free and at large from the custody of said Stratton, and did then and there unlawfully, riotously, &c. throw a dangerous missile, called a brickbat, at and towards said Stratton, which missile hit and dangerously wounded one Adam Grant, then and there one of the watchmen of said city of Boston, who then and there was acting as an assistant of said Stratton, constable as aforesaid; and other wrongs and injuries, unlawfully, riotously and routously did and committed," &c.

At the trial, the time of the committing of the acts alleged in the indictment was proved to have been about 11 o'clock on the night of the 20th of October 1842, and immediately after a hearing and other proceedings had before the chief justice of the supreme judicial court, assisted by the other justices of said court, by *habeas corpus*, in the case of said Latimer, and while said Stratton was conducting said Latimer to jail. (See a statement of the proceedings on the writ of *habeas corpus*, as they were proved on the trial, in the opinion of the court, *post.* p. 545.)

It was proved, at the trial, that on the 19th of October 1842, a complaint, on the charge of larceny in the city of Boston, was made by E. G. Austin, Esq., in the police court of said city, against the said Latimer; that a warrant was issued thereon, according to law, and delivered to said Stratton, a constable of said city, who, by virtue thereof, on the same day arrested said Latimer and committed him to jail. It was further proved, that on said 20th of October, about 3 o'clock, P. M., in said police court, the aforesaid complaint was dismissed, and all proceedings thereon ended by said court. It was then proved, that on

said 20th of October, at about 11 o'clock, A. M., another complaint, on the charge of larceny in Norfolk, in the State of Virginia, and being a fugitive from justice from said State, was made by said Austin, against said Latimer, in said police court ; that a warrant was issued thereon and delivered to said Stratton, constable as aforesaid, who, before noon on the same day, by virtue thereof, arrested said Latimer, and committed him to jail. It was also proved, that a written authority from James B. Gray, who claimed said Latimer as his fugitive slave, was delivered to said Stratton, to hold and keep said Latimer as such fugitive slave, at the same time when each of the aforesaid warrants was delivered to him. It did not appear that said Latimer had been charged, before any competent tribunal in Virginia, with the alleged crime of larceny there, nor that he had been demanded by the executive of said State, as a fugitive from justice, before the making of the complaint and the issuing of the warrant aforesaid, on the 20th of October.

The defendants objected to the admission in evidence of the complaint and warrant last mentioned, but the objection was overruled, and the same were proved to the jury.

The defendants offered a witness to testify to declarations, made by said James B. Gray, that Latimer had never committed any larceny, and that he was arrested on that charge, merely to get him into custody, so that he might be more easily carried home ; and also to prove that said Stratton had knowledge of this fact. The court refused to receive this testimony.

The defendants' counsel requested the court to instruct the jury, 1st, that the complaint and warrant of the 20th of October, by virtue of which said Stratton held said Latimer as a prisoner to be examined on a charge of larceny in the State of Virginia, and being a fugitive from justice from said State, did not support the indictment, but were a material variance from the allegations therein ; and 2d, that said warrant, issued upon the complaint to the police court, was illegal and void ; the said court having no jurisdiction in the premises. But the court instructed the jury, that said complaint and warrant did not vary from the allegations in the indictment, in a material point, but substantia-

ly supported the same ; that said warrant was not illegal and void, as the police court had full authority and jurisdiction in the premises under Rev. Sts. c. 142, § 8, which section does not conflict with the laws of the United States ; that said Stratton holding said Latimer, as agent of said Gray, as aforesaid, was not incompatible with his holding him as a prisoner under said warrant ; that the written authority aforesaid, given to Stratton by Gray, did not vitiate or take away from Stratton the protection of said warrant, as the warrant was an authority paramount thereto ; and that after the said order of the chief justice of the supreme judicial court, remanding Latimer to the custody of said Stratton, as agent of said Gray, said Stratton held Latimer, as well by virtue of said warrant, as constable, as by said written authority, as agent of said Gray.

The jury found that said Tracy, Saunders and Smith were guilty, and strongly recommended them to the mercy of the court ; but that said Williams and Wood were not guilty.

The defendants, who were found guilty, alleged exceptions to the foregoing rulings and instructions of the court.

Ellis, for the defendants. The warrant given in evidence does not support the indictment. The indictment alleges a warrant issued on a complaint for larceny ; but the warrant given in evidence, was issued on a complaint for larceny in another State, and also on the charge of fleeing from justice.

A charge must be proved as laid. The criminal acts alleged, and those proved, must be identical. Mere surplusage may vitiate an indictment ; for matters of mere description, which might be stricken out, may, by being too broad or too narrow, vitiate the indictment, by failing to identify the offence. The omission of a material description has the same effect. The question is not, whether more or less is proved than is charged, but whether it is the same. And whatever is descriptive of that which is material, or describes or limits what is essential to the charge—whether place, time, title, character, office, the record or precept of a court or officer, or any thing else, which identifies it with the acts given in evidence—must be strictly proved. For the same reason, no acts can be given

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in evidence, if any of these characteristics show them not to be the same, or if the indictment omits those descriptive particulars, so as to render it uncertain whether they are those with which the prisoner is charged. 2 Rol. Ab. 719. Bul. N. P. 5. *Harris v. Rayner*, 8 Pick. 541. *Rex v. Taylor*, 1 Campb. 404. *The State v. Martin*, 3 Murph. 533. *Weall v. King*, 12 East, 452. *Amey v. Long*, 1 Campb. 14. *U. States v. Lakeman*, 2 Mason, 229. *Dillingham v. U. States*, 2 Wash. C. C. 422. *U. States v. M'Neal*, 1 Gallis. 387. *Whitaker v. Smith*, 4 Pick. 85. *Regina v. Cranage*, 1 Salk. 385. 2 Hawk. c. 46, § 181. Greenl. on Ev. § 63.

In the present case, the description of the warrant was material to the trial, and ought to have been accurate. Two warrants were in force, at different times. It also affected the jurisdiction of the court that issued the warrant, and the right of those acting under it; and any discrepancy between the allegations and the proof, in matters material to the jurisdiction, is fatal. 3 Stark. Ev. 1529, 1543. Greenl. on Ev. § 65.

But if the warrant proved was the same which was described in the indictment, yet it was unlawful; because Latimer had never been *charged*, as required by the Rev. Sts. c. 142, § 8; because it does not appear that he was liable to be given up, under the laws of the United States; because the complaint does not set forth such other circumstances, besides the offence, as were necessary to bring the case within the provisions of the law; and because the 8th section of c. 142 of the Rev. Sts. is unconstitutional.*

If the surrender of fugitives from justice were a subject of which the federal and state jurisdiction might be concurrent, in

* That section is in these words: "Whenever any person shall be found within this State, charged with any offence committed in any other State or Territory, and liable, by the constitution and laws of the United States, to be delivered over upon the demand of the executive of such other State or Territory, any court or magistrate, authorized to issue warrants in criminal cases, may, upon complaint under oath, setting forth the offence, and such other matters as are necessary to bring the case within the provisions of law, issue a warrant to bring the person so charged before the same or some other court or magistrate, within the State, to answer to such complaint, as in other cases "

the absence of express law, yet as soon as any laws on the subject are made by congress, the jurisdiction of the State is at an end. 1 Kent Com. (3d ed.) 388. 3 Story on Constitution of U. States, § 1748. This is the principle established in *Houston v. Moore*, 5 Wheat. 1, and in *Prigg v. Commonwealth of Pennsylvania*, 16 Pet. 539. This last case related to fugitive slaves; but the court remarked, that the legislation of the United States, over the subject of fugitive slaves and fugitives from justice, must supersede state legislation upon the same subject. If that case does not in fact decide the present, the same reasons apply to it, with equal or greater force. The nature of the subject peculiarly demands uniformity of action and unity of will.

It was only on the adoption of the constitution of the United States that the surrender of fugitives from justice became a duty of the States. Before, it was a matter of mere national comity, never obligatory, and often refused. Story's Conflict of Laws, § 628. Congress created the rule, and therefore should have supreme and sole control over the limits and mode of its enforcement.

If the police court had no jurisdiction, the warrant was illegal, and could be no justification of the officer. 22 Vin. Ab. Void or Voidable, A. 17. *Cable v. Cooper*, 15 Johns. 157. *Bulter v. Potter*, 17 Johns. 145. *Pearee v. Atwood*, 13 Mass. 324. *Sanford v. Nichols*, 13 Mass. 286. *Brown v. Compton*, 8 T. R. 424. *Parton v. Williams*, 3 Barn. & Ald. 330.

The officer forfeited the protection of the warrant, if he acted as the agent of Gray. There is no obligation, besides that which is imposed by the constitution and laws of the United States, to aid in the support of slavery. The law of Massachusetts regards slavery as *malum in se*, and therefore will not extend that obligation beyond the strict limits set by the terms of the federal government. Our state officers, therefore, cannot be required or permitted to lend their aid to support it; for it is a perversion of justice to suffer one to do acts plainly beyond the sphere of his official duty, under color of office. See *Termes de la Ley*, Color of Office. *White v. Taylor*, 4 Esp. R. 80. *Samuel v. Payne*, 1 Doug. 359. *McCloughan v*

Clayton, Holt N. P. 478. It would be a fraud on the law to suffer one to claim the protection of a precept which he aided in procuring under a feigned charge, for iniquitous and unlawful purposes.

The duties of officer and agent were incompatible and conflicting in the present case. As officer, it was Stratton's duty to apprehend, detain and commit Latimer, to answer charges. As agent, he was to seize and carry him away. But if he could act in this double capacity, he might seize and carry out of the State, with impunity, any person whatever. The temptation thus held out to the abuse of office should settle the rule, that no officer can claim protection, as such, while doing an act in violation of his duty, or inconsistent with it; certainly not, when he is dishonestly abusing his power.

It should have been left to the jury to decide, upon all the circumstances of the case, whether Stratton was in fact acting in good faith, in the service of a lawful precept, as an officer; or, under the cloak of such precept, was acting as Gray's agent to seize his slave. And to assist the jury in deciding this point, the testimony, which was excluded, was pertinent and should have been admitted.

The laws of the United States point out the proper officers for this business. The laws of Massachusetts have provided none. Unless proof that Stratton was acting under color of official authority, only in order to enable him to carry a person out of the State by force, be admissible, then our State goes so far as to provide officers, armed with all the authority of law, to catch slaves; whereas, even if the whole matter were not, by the constitution and laws, in the hands of the federal government, a law of the Commonwealth, assigning such a duty to her officers, would be unconstitutional; because, in the absence of any condition in the frame of the general government, or the enactments of Congress, to that effect, she must be guided by her own constitution

Austin, (Attorney General,) for the Commonwealth. The indictment is for a riotous assault on an officer while in the execution of his office under a legal warrant; and it need not have

set out more. 4 Mass. 391, & note. The needless matter, set forth in the indictment, may be regarded as surplusage, immaterial to the crime charged, and not requiring proof; so that the objection of variance is unfounded. But if it must be proved, because it is alleged, it is sufficient to prove it, in substance; and so it was proved. Literal and exact proof is not necessary. The first warrant, charging Latimer with larceny in Boston, was right, although the original taking was in Virginia. *Commonwealth v. Cullins*, 1 Mass. 116. *Commonwealth v. Andrews*, 2 Mass. 14. This warrant, however, was superseded, and another was taken out on a charge of larceny in Virginia. And if it were true, that Latimer was called upon to answer to two offences, yet there would be no variance, as the offence of larceny was shown to have been charged. All that is charged need not be proved in order to prevent a variance. Being a fugitive from justice is not an indictable crime; and the allegation, that Latimer was such fugitive, was a *descriptio personæ*, and did not affect the crime of larceny for which he was arrested.

The 8th section of c. 142 of the Rev. Sts. does not interfere with the laws of the United States, and therefore does not fall within the decision in *Prigg v. Commonwealth of Pennsylvania*, 16 Pet. 539. If the provisions of that section are unconstitutional, then the similar provisions of the New York statute are unconstitutional, and thieves may steal in Massachusetts, and carry their plunder to New York, with perfect impunity.

There is nothing in Rev. Sts. c. 142, which requires that the charge of an offence in another State shall be first made in that State, in order to authorize the issuing of a warrant for apprehending the offender here. The charge may be first made here. Surely it is within the competency of the legislature of every State to provide for the maintenance of peace, order and security within its territory, and to cause the apprehension of dangerous offenders who may flee into it from other States.

As Stratton had a lawful warrant from the police court, he was well authorized to act under it; and his agency for Gray, whether lawful or unlawful, could not impair his authority as

constable. Nor was the evidence of Gray's declarations and of Stratton's knowledge of them admissible. The complaint was not made to the police court by Gray. And if it had been, and if the warrant had been fraudulently obtained, and if Stratton had reason to believe it to have been so obtained; yet as it was lawful on its face, he was bound to execute it. *Savacoli v. Boughton*, 5 Wend. 170.

But suppose the warrant to have been unauthorized; this does not excuse a riotous attack upon the officer who was acting under it. Strangers cannot lawfully interpose by violence, even in such a case. 1 East P. C. 325, 328.

SHAW, C. J. This case comes before the court by exceptions alleged by the three defendants, who were found guilty by the jury, to the rulings and instructions of the municipal court.

It appears by the bill of exceptions, that on the trial evidence was offered, to show that at the time of the alleged riot and attempt to rescue, on the night of the 20th of October, the said Jonas Stratton was a constable of Boston, duly appointed and qualified, that he had in his custody the said George Latimer, a colored man; that on the 19th of October, a complaint had been made in the police court, charging the said Latimer with the crime of larceny in Boston, on which he was arrested; but that on the afternoon of the 20th, the said complaint had been dismissed, and all proceedings thereon ended; that in the forenoon of the same day, another complaint had been made in the police court, charging the said Latimer with a larceny in Norfolk, Virginia, and being a fugitive from justice; upon which a warrant issued, to arrest the said Latimer, and upon which the said Stratton had arrested the said Latimer, and had him in custody, at the time of the supposed riot and attempt to rescue.

It appears by the bill of exceptions, that another fact was given in evidence, though not stated in the indictment, which was this; that shortly before the said riot, in the evening of said 20th of October, a writ of *habeas corpus* was issued by the chief justice of the supreme judicial court, the court itself not being then in session, returnable before himself forthwith, in behalf of said Latimer. On a return of said writ, by said Stratton, be-

fore the chief justice, the other judges being present, for other purposes, the case was heard by all the judges ; whereupon it was certified by the chief justice, acting in that respect, with the aid and advice of the other judges, as follows : “ It appearing that the said Latimer is in custody of Jonas Stratton, as the agent of James B. Gray of Norfolk, Virginia, claiming the services of the said Latimer as a fugitive from labor and service, and that at the time of the service of this writ,” (of *habeas corpus*) “ the said Gray was about proceeding to convey the said Latimer before the proper tribunal, to obtain a certificate, according to the law of the United States ; ordered that the said Latimer be remanded to the custody of said Stratton.”

1. The first exception taken is, that there was a material variance between the complaint and warrant from the police court, as set out in the indictment, and the complaint and warrant offered in evidence in support of this averment.

The manner in which this complaint and warrant are described in the indictment is as follows ; — after referring to said Stratton as a constable, then in the discharge of the duties of his office — “ being in the service of a legal precept to him directed, and then having one George Latimer, otherwise called Albert Mason, in his custody as a prisoner, to be examined, on a charge of larceny, by the police court of said city, according to a certain lawful precept to him directed and issued by said police court, under its seal, upon a complaint made and sworn to, according to law, the said police court having lawful jurisdiction in the premises.” The evidence, offered in support of this averment, was a warrant issued by the police court, in due form, under its seal, to answer to a complaint of E. G. Austin, Esq. for larceny by said Latimer in the State of Virginia, and being a fugitive from justice, in said city of Boston.

It is to be kept in mind, that this is not a question of jurisdiction. That is the subject of a separate exception, to be considered afterwards. But it is simply a question of variance between the indictment and the proof. And the court are of opinion that there was no such variance. The difference is between a description more or less particular. The description

does not embrace all the particulars ; but as far as it goes, the warrant offered in evidence conforms to the description. It was described as a warrant, on a complaint for larceny, to be examined before the police court. The complaint was technically a complaint for larceny, though committed in another State ; and the prisoner was to be examined thereon in the police court, in pursuance of a provision of a statute of the Commonwealth ; though not as having violated a law of this State, but as a fugitive from justice, from another State.

The case was argued, as if we were bound to presume that the grand jury, by the indictment returned, intended to describe the first warrant issued on the 19th of October, on a complaint of larceny in Boston ; and as all proceedings on that complaint had terminated before the time mentioned in the indictment, the averment was not supported by the proof. But we do not perceive, on what ground we are to presume that the grand jury intended a warrant on which all proceedings had terminated, and so was *functus officio*, and not a warrant in force at the time. The only question is one of description ; whether this last conforms to the description, in the indictment, of a warrant from the police court, on a complaint for larceny. The ground of this decision is, that it was a complaint for larceny, though the larceny is stated as having been committed in another State.

2. The second exception relied on is, that the police court had no jurisdiction of a felony committed in another State ; and as no requisition for the delivery of the offender had been made by the executive of Virginia, conformably to the constitution of the United States and the act of congress of 1793, c. 51, there was no authority, under which a warrant could issue, for the arrest of Latimer. This depends upon the constitutionality and validity of the Rev. Sts. c. 142, §§ 7-11, in regard to fugitives from justice. The case in question was precisely within the provisions of those statutes, which authorized a complaint against any person found in this Commonwealth and charged with having committed a crime in another State ; and that before any requisition from the executive of such State. But it is contended that this statute is unconstitutional and void, beca~~use~~

the sole purpose thereof is to aid in carrying into effect a duty devolving upon the citizens of the State, by the constitution of the United States, under which congress have legislated by the act of 1793 ; and as the authority of the government of the United States is paramount and exclusive, all state laws, designed to promote the same object, are void. *Houston v. Moore*, 5 Wheat. 1. *Prigg v. Commonwealth of Pennsylvania*, 16 Pet. 539. The authority of the latter case was mainly relied on ; and there are passages in the opinion of the majority of the court, which would seem to warrant the proposition. It was intimated in that case, but not decided, that all state laws, on the subject of fugitives from justice, were void, because, by the constitution of the United States, jurisdiction over the whole subject is vested in the government of the United States, and the will of the government is as much to be discerned, in what they have omitted, as in what they have enacted ; and therefore that all state laws on the subject must be void.

But it is to be remembered in this case, that the only subject in judgment before the court was the validity of state laws, in regard to fugitive slaves ; and all that was said, in regard to state laws respecting fugitives from justice, was merely by way of analogy and illustration. And there may be some grounds of distinction between the two cases. The ground, on which the majority of the court decided, was, that the owner of a slave, in the State where slavery is recognized, has a specific remedy for the loss of his slave, by the recaption of the slave, without the intervention of any legal process ; and that it was the purpose of the provision of the constitution, to secure to the owner of a slave the same right of recaption in the other States, which he has by the municipal law of his own State. The only aid, therefore, which he has need of, from any law, either of the United States or of the State, is to enable him to obtain the custody of the slave. This was the ground, on which the decision of the majority of the court, in that case, was placed. But it is obvious, that the right of one State to claim the delivery up of fugitives from its justice, who have escaped into another, is of a very different kind. It is founded

it is true, upon an express provision of the constitution of the United States ; but it can be carried into effect, only through the medium of laws, and by the intervention of officers and magistrates. Such is the distinction between the two cases, that it is not to be concluded, until the question arises, that principles, applicable to one of these cases, must necessarily apply, in all their extent, to the other.

Again ; although a majority of the supreme court of the United States were of opinion, that all state laws, on the subject of fugitive slaves, as well those in aid of the rights intended to be secured by the constitution of the United States, as all those which might in any manner obstruct, defeat or hinder them, were wholly void ; yet several of the judges were of opinion, that laws of a State would be void only so far as they should tend to defeat or impair the rights intended to be secured, or so far as they should be repugnant to the constitution and laws of the United States.

But even this majority of the court, in deciding that the power of legislation on this subject is exclusively vested in congress, take care to insert a qualification, showing that this principle applies only to those state laws, the exclusive *purpose* of which is, to impede, or assist, or otherwise control masters in reclaiming their slaves ; that is, when the sole purpose is to regulate the practical assertion of this right. They are careful to declare it as their opinion, that States, under their general power to secure the peace, may cause fugitive slaves to be arrested and restrained, to remove them from their borders, for their own security ; and although such regulations may indirectly aid the owners of slaves in recovering them, yet, that not being the object and purpose of the statute, it will not be void, if it do not interfere with or obstruct the owner in reclaiming his slave. With this view of the grounds, on which the case of *Prigg v. Commonwealth of Pennsylvania* was decided, the court are of opinion that it is not decisive of the present case.

The Rev. Sts. c. 142, § 7, provide for the course of proceeding, when a demand shall be made upon the executive of this Commonwealth, in any case authorized by the constitution

and laws of the United States. If the provisions in this section were in any respect repugnant to the law of the United States, it must be held void. The general rule in regard to conflicting laws of the United States and of the State, where the United States have jurisdiction, is, not that the act of the State may not, in some respects, have the force of law; but that so far as it conflicts with that of the United States, which, in the case supposed, is the supreme law of the land, the state law is inoperative and void. If the section in question were the only provision on the subject, as it purports to provide for a subject placed within the exclusive jurisdiction of the United States, it might be held, on the authority of *Prigg's case*, to be intended for the sole purpose of regulating such subject, and consequently void. But the succeeding sections go further, and provide, § 8, that whenever a person shall be found within this State, charged with any offence committed in another State, and liable, by the constitution and laws of the United States, to be delivered over, &c., upon complaint made, he may be arrested and brought before a magistrate. The following sections direct the manner of proceeding against him; requiring him to give bail or be imprisoned, and providing for his discharge, and for the payment of expenses by the complainant.

It is competent for any State to make all such laws, as in the judgment of the legislature may be necessary to secure the peace, and promote good order, within its borders. The provisions in question are primarily intended, no doubt, to aid in the discharge of the important duty due to other States, of surrendering fugitives from justice, by taking precautionary measures to secure their persons. But we think it manifest, that this is not the sole object. The persons described are those who have recently committed known crimes in adjoining States, and fled into this. Being liable to be demanded and surrendered, as fugitives from justice, may be considered as *descriptio personarum*; and it significantly describes a class of persons dangerous to the security and peace of our own community. Their presence is likely to cause disturbances. A wise government, bound to maintain peace and good order within its terri

tories, and authorized to exercise a salutary vigilance and restraint over all persons within its jurisdiction, may well provide for arresting such persons, and subjecting them to a judicial examination, and requiring them to give bail for their appearance and good behavior, or be imprisoned, if they be found to have committed capital offences in other States, until due inquiry can be made, and all persons injured by them have an opportunity to institute such proceedings, criminal or civil, as justice may require. A government is not bound to wait till its own laws are violated. Reasonable apprehension of danger is sufficient to justify a preliminary interposition to prevent it. It is analogous to the case of persons, who by their language or conduct have shown themselves dangerous; they may be secured by bail, or by actual imprisonment, to prevent mischief.

With this view of the power of the State, and the purposes of the law, the court are of opinion, that the provision of the Rev. Sts. c. 142, § 8, authorizing any court or magistrate, on complaint against any person found within this State, charged with an offence committed in any other State, and liable by the constitution and laws of the United States to be delivered over, &c., to issue a warrant and cause such person to be held for examination, and imprisoned or bailed for a limited time, is a wise law, and one which the legislature are competent to make and enforce, independently of their constitutional obligation to surrender such person to other States, for trial and punishment. It is a provision obviously not repugnant to the constitution and laws of the United States, nor tending to impair the rights, or relax the duties, intended to be secured by them. To this extent, therefore, the court are of opinion that this law is constitutional and valid; one that the legislature had authority to pass; and therefore that the warrant issued under it, and pursuant to its provisions, by the police court, and under which Stratton was acting at the time of the alleged riot, was valid, and that the averment in the indictment, that the police court had jurisdiction in the premises, is well sustained by this proof. Whether in an indictment for riot, averring an attempt to rescue a prisoner from the lawful custody of an officer, it is necessary to

state the warrant under which such officer was acting, and the jurisdiction of the court from which it issued, or whether it would be sufficient to state, in general terms, that he was an officer, having a prisoner in custody by lawful authority, we give no opinion.

3. The next exception is, that as it appeared that the said Stratton was acting as the agent of the person claiming the custody of the prisoner as a slave, he could not avail himself of the protection derived from the warrant from the police court. The true question seems to be, whether an officer forfeits the protection which he has under a lawful warrant from the state authority, because he holds at the same time an authority, by power of attorney, from one claiming the custody of the same individual, as a fugitive slave, and proceeding before the courts of the United States to obtain a certificate, pursuant to the constitution and laws of the United States. Such was the character of the authority which Stratton then held ; and it appears from the bill of exceptions, that the alleged riot and attempt to rescue the prisoner took place immediately after he was remanded to the custody of said Stratton, on the hearing of the *habeas corpus* and return. There was nothing in this order inconsistent with the warrant under which the officer claimed to hold the prisoner in custody. Any one ground for remanding the prisoner to the custody of the officer was sufficient to dispose of the writ of *habeas corpus*, without deciding on any other. We think, therefore, that the averment in the indictment, that the officer was in the exercise of a lawful authority, under a warrant from the police court, is sustained by the evidence, and is not controlled nor falsified by the proof that he claimed to act and hold the prisoner under another authority *in pais*.

4. The next exception is founded on the rejection of evidence. The defendants called a witness to prove declarations made by James B. Gray, that Latimer had never committed any larceny ; that he was arrested on that charge merely to get him into custody, so that he might more easily be carried home ; and to prove that said Stratton had knowledge of that fact. This evidence was not admitted.

It seems to us, that this evidence was rightly rejected. It is necessary, in order to judge of its relevancy, to consider by whom it is offered, and for what purpose. It is offered by persons charged with riotously and forcibly resisting an officer in the execution of a warrant issued by lawful authority. The objection assumes, that if the complaint on which the warrant issued is false and groundless, and the officer is informed of it, he may not execute it. It would be to transfer the jurisdiction of hearing and inquiring into the merits of the complaint, from the court to the constable serving its process ; and it would compel him, at his peril, to decide right. Stating this proposition is sufficient to refute it.

5. The last exception is, that the holding of this warrant, by Stratton, at the same time that he held a power of attorney from Gray, claiming the custody of the prisoner as a slave, was an abuse of the process of the court. This is substantially the same point already considered. The question is, in what way it is to be considered as an abuse. May not an officer have several good detainers at the same time ? And in that case, will one defeat or avoid another ? In this case, the only inquiry is as to the validity of the complaint and warrant from the police court ; because it is that complaint and warrant which were set out in the indictment, and therefore to be proved on the trial. Had it been charged in the indictment, that the said Stratton held said Latimer on a lawful authority, as the agent of said Gray, then it would have been material to inquire into the legality and validity of that authority. But as the indictment was framed, that became unnecessary. Suppose, however, that both had been set out and both proved ; would one defeat the other ? The instances of having several detainers, of different kinds, against the same person at the same time, are familiar. A person may be arrested by the same officer as a criminal, a debtor, a deserting seaman, and the like, and all at the same time. It would not be the less true, that the prisoner was in lawful custody, under any one good warrant designated, because the officer claimed to hold him under other warrants, whether valid or not.

The court are of opinion, that the decisions of the municipal court, and the instructions to the jury, were correct, and that the exceptions must be overruled, and the conviction held good.

ENOCH F. GOODHUE vs. THE COMMONWEALTH.

An indictment under the Rev. Sts. c. 47, § 3, is good, which alleges that the defendant, on, &c., at, &c., without any legal authority or license, "did presume to be and was a retailer of spiritous liquors, in less quantity than twenty-eight gallons, and that delivered and carried away all at one time, and did then and there sell and retail two quarts of spiritous liquors to" a person named.

WRIT of error to reverse a judgment of the court of common pleas in the county of Middlesex, at the February term, 1842, sentencing the plaintiff in error to the payment of a fine of \$ 20 and costs.

The indictment, on which the plaintiff was found guilty and sentenced, alleged that he, "on the 2d of March 1841, at Dra-cut, without any authority or license therefor duly had and obtained according to law, did presume to be and was a retailer of spiritous liquors in less quantity than twenty-eight gallons, and that delivered and carried away all at one time, and did then and there sell and retail two quarts of spiritous liquors to Zebediah Jones, against the peace of the Commonwealth, and contrary to the form of the statute in such case made and provided."

It was assigned for error, 1st, that the indictment does not allege that said Goodhue sold a less quantity of spiritous liquors than twenty-eight gallons, and that delivered and carried away all at one time ; and, 2d, that it does not allege any particular instance of selling spiritous liquors in less quantity than twenty-eight gallons, and that delivered and carried away all at one time.

J. G. Abbott, for the plaintiff in error. The first allegation in the indictment, viz. that Goodhue "presumed to be and was a retailer," &c., will not sustain the judgment. This was decided in *Commonwealth v. Thurlow*, 24 Pick. 374, which was

an indictment, as the present is, on Rev. Sts. c. 47, § 3. It was there held, that it was not sufficient to follow, in the indictment, the words of the section, but that a distinct act of selling must be averred. The question then is, whether the last allegation, viz. of a sale of a given quantity of spiritous liquor, without negating that it was a part of twenty-eight gallons, and that delivered and carried away all at one time, is sufficient. In *Commonwealth v. Odlin*, 23 Pick. 275, such allegation was decided to be insufficient; and the decision in that case was recognized in *Commonwealth v. Churchill*, 2 Met. 126.

Austin, (Attorney General,) for the Commonwealth. This indictment is precisely like the fifth count in the indictment in *Thurlow's case*, 24 Pick. 374, which was held to be good.

SHAW, C. J. The court are of opinion that the indictment is good, being within the authority of *Commonwealth v. Thurlow*, 24 Pick. 374. In that case, the same exception was taken to a count in all material respects exactly like the present, and the exception was overruled and the count held good.

An averment that the defendant did sell and retail two quarts of spiritous liquors is an averment that he sold the liquor in a less quantity than twenty-eight gallons. *Commonwealth v. Eaton*, 9 Pick. 165. *Commonwealth v. Pearson*, 23 Pick. 280, *note*.

In the case of *Commonwealth v. Odlin*, 23 Pick. 275, which was under the St. of 1838, c. 157, (called the fifteen gallon law,) the averment was simply, that he "did sell one pint of spiritous liquor," without using the word "retail," or any other words indicating that it was one pint only, or that it was not part of a larger quantity.

Judgment affirmed.

COMMONWEALTH vs. GEORGE J. HOMER & another.

The provision in Rev. Sts. c. 143, § 51, for the punishment of prisoners who forcibly break prison, with intent to escape, or by force or violence attempt to escape therefrom, although no escape be effected, does not apply to prisoners who are held in custody for trial, or for not obtaining bail for their appearance, but only to convicts who are sentenced to a term of imprisonment as a punishment, and are confined in pursuance of the sentence.

GEORGE J. HOMER and Ezekiel S. Kent were tried, and found guilty by a jury, in the municipal court, at the December term, 1842, on an indictment which alleged that they, being lawfully detained in the jail in Boston, on the 3d of December 1842, with force and arms, did unlawfully, wilfully and forcibly break the said jail, with intent to escape therefrom, and did attempt, by force and violence, to escape from said jail and go at large, although no escape was effected. It appeared from the averments in the indictment, that at the time of the alleged breaking and forcible attempt to escape, the defendants were detained in said jail on a mittimus, by reason of their severally failing to give bail for their appearance at the municipal court, to answer to indictments found against them severally, as herein-after stated in the opinion of the court.

The judge of the municipal court, after the jury returned their verdict, reported the case for the decision of this court, on the question of law raised by the defendants' counsel, and thereupon all further proceedings in that court were stayed.

Bancroft, for the defendants. The question in this case arises on Rev. Sts. c. 143, § 51, which provide that "if any person lawfully imprisoned for any cause in any prison or place of confinement lawfully established, other than the state prison, shall forcibly break the same, with intent to escape, or shall by force or violence attempt to escape therefrom, although no escape be effected, he shall be punished by imprisonment, &c., not more than one year, in addition to any term for which he was held in prison, at the time of such breaking or attempt to escape." This provision can apply only to convicts who are confined on sentence. The time during which a prisoner is held for want of bail, &c., cannot be called a "term," for it is of uncertain duration.

Austin, (Attorney General,) for the Commonwealth. The 49th and 50th sections of c. 143 of the Rev. Sts. provide for the punishment of persons imprisoned under sentence, who break prison and escape. The 51st section extends to all persons "lawfully imprisoned"; and the provision, that their punishment, on conviction of a breach of prison, or of a forcible attempt to escape, although no escape is effected, shall be by imprisonment in addition to the term for which they were previously held, presents no insuperable objection, in the present case. The time can be ascertained by reference to the term of the court at which the defendants were required to give bail to appear.

SHAW, C. J. These prisoners are indicted on the Rev. Sts. c. 143, § 51, and in the indictment it is alleged, that they were lawfully imprisoned in the common jail in this county, for the causes specially stated, and the indictment charges them severally with having broken the said prison, with intent to escape, and that they attempted with force and violence to escape, though no escape was effected. The learned judge of the municipal court, having instructed the jury, that in his opinion the offence charged was an indictable offence within the statute, yet believing the question to be very important and somewhat doubtful, reserved the case, and reported it to this court, for its opinion, pursuant to the provision of Rev. Sts. c. 138, § 12.

The question depends on several sections of the revised statutes, the principal provisions of which are taken from St. 1834. c. 151, § 14. The question is, whether persons, not convicts under sentence as a punishment for crimes, but persons confined for trial, for want of bail, and the like, are amenable for an attempt by force and violence to escape, or for breaking jail with intent to escape, when no escape is effected.

In construing a single statute provision, when the language is doubtful or ambiguous, it is proper to consider it in connexion with the whole of the same statute, and with other statutes on the same subject. The Rev. Sts. c. 143, § 49, provide, that "if any person, lawfully imprisoned in any jail or house of correction, under sentence of confinement at hard labor, shall break such prison and escape, he shall be punished by imprisonment in

the state prison or county jail, not more than three years, in addition to the unexpired portion of the time, for which he was originally sentenced." On this section it is observable, that it is confined, in terms, to one under sentence to confinement *at hard labor*, actually breaking out and escaping, and directs the further term to be suffered, not according to the first sentence, in a house of correction, but in the state prison or county jail.

Section 50 provides for the case of one "lawfully imprisoned in any jail, house of correction, or house of industry, for any cause not mentioned in the preceding section," who shall actually "break such prison and escape"; and it provides for his punishment "by imprisonment not more than one year, in addition to the unexpired portion of *the term*, for which he was originally sentenced."

Though the former part of this section is large enough, in its terms, to include the cases of persons lawfully imprisoned, but not under conviction and sentence, yet the latter words seem to confine it to the case of a person under sentence for some term; and thus limited, it applies to the cases of persons sentenced for crime, but not to hard labor. This construction is fortified by reference to *St. 1834, c. 151, § 14*, from which both of the foregoing provisions are taken, with no other alteration than a slight change of phraseology. In this, the provision corresponding with the second of the above, viz. persons other than those sentenced to hard labor, the words are, "if any other *convict* shall escape," &c., clearly indicating, with the clause for punishment in addition to the term, &c., that it was intended to apply only to the case of persons convicted and sentenced.

Then comes § 51, on which this indictment is founded; which is a new provision, and not taken from any preëxisting statute. It provides, that "if any person, lawfully imprisoned for any cause, in any prison or place of confinement established by law, other than the state prison, shall forcibly break the same, with intent to escape, or shall by any force or violence attempt to escape therefrom, although no escape be effected, he shall be punished by imprisonment in the county jail or house of correction, not more than one year in addition to any term for which

he was held in prison, at the time of such breaking or attempt to escape."

If this provision stood alone, there would be some reason to hold that it extended to all persons lawfully confined in prison. But here is the same provision, that he shall be punished by imprisonment for a term, in addition to any term for which he was held in prison ; implying that he was held for some fixed or certain term, by some order or sentence. But a more decisive consideration is, that by this construction, one would be punishable for an unaccomplished intent, or an unsuccessful attempt to do an act, where the actual doing of it would not subject the party to punishment ; an intention, which is not to be attributed to the legislature, unless clearly expressed.

Taking these enactments together, as parts of an entire system, it appears to us, that they are harmonious and consistent. The first imposes a severe punishment upon one convicted and sentenced to hard labor, who shall break out and escape ; the second imposes a less severe punishment upon a person sentenced to imprisonment, but not to hard labor, who shall actually break out and escape ; the third applies to a convict of either class, who shall commit an overt act of breaking prison, with intent to escape, or by open force or violence attempt to escape, without accomplishing it.

We are therefore of opinion, that the unsuccessful attempt to break jail and escape, by one who is held in custody for trial, or for non-compliance with an order to get bail for his appearance, is not an indictable offence under this statute.

In applying this construction of the statute to the present case, it appears that George J. Homer was committed by a warrant from the municipal court, to answer to an indictment found against him for larceny in a shop, to a large amount, and failing in complying with an order to recognize with surety in the sum of \$ 200, to appear in said court and take his trial on that indictment. It appears, therefore, that according to the construction stated, he was not liable to the penalty of the above statute, not being convicted of any offence, nor sentenced to any punishment.

It also appears that Ezekiel S. Kent was committed under a

warrant from the municipal court, to answer to an indictment for having tools for counterfeiting, and because he had failed to comply with an order to give bail, in the sum of \$ 1000. His case, therefore, is not within the statute.

In both cases, therefore, that of George J. Homer and Ezekiel S. Kent, the judgment on this indictment must be arrested; and they are ordered to go thereof without day.

COMMONWEALTH vs. JOHN P. BRIGGS & another.

Where a conditional sentence is awarded against a convict, under Rev. Sts. c. 139, by which he is ordered to pay a fine within a limited time, and in default of payment to be imprisoned, and he is committed to jail, to be detained until such sentence is complied with, he is imprisoned for a fixed term by way of punishment, within the true intent of Rev. Sts. c. 143, § 51, and if he forcibly breaks jail, with intent to escape, or by force or violence attempts to escape therefrom, before the time limited for the payment of the fine has elapsed, he is liable to punishment for such breach or attempt.

THE defendants, John P. Briggs and Alonzo S. Chapin, were tried and found guilty by a jury, in the municipal court, at the December term, 1842, on an indictment which charged them with forcibly breaking the jail in Boston, in which they were lawfully imprisoned, and attempting, by force and violence, to escape therefrom, although no escape was effected. The judge, being of opinion that the question of law in the case was so important and doubtful as to require the decision of this court, reported the case, so far as was necessary to present that question. The facts of the case are stated in the opinion given by the chief justice.

Ellis, for the defendants.

Austin, (Attorney General,) for the Commonwealth.

SHAW, C. J. The defendants are both indicted for the same offence just considered in the case of *Commonwealth v. Homer & Kent* (*ante*, p. 555) namely, that of breaking the jail, and attempting by force to escape, though no escape was effected. The case depends on Rev. Sts. c. 143, § 51, already considered.

It appears that Chapin stood committed on a warrant from the municipal court, to answer to an indictment for stealing property of small value, and failing to give bail for \$100. Upon the principles already stated, he is entitled to be discharged from this indictment.

The case of Briggs stands upon a different footing. It appears that at the time of his breach of jail and attempt to escape, he was held in prison under sentence for an aggravated assault and battery. He was sentenced to pay a fine of \$100, and costs, \$78, and to recognize, with surety, for the term of one year, to keep the peace and be of good behavior, and if said fine and costs should not be paid in ten days, then to be confined at hard labor one year in the house of correction, and to stand committed according to said sentence. Before his removal to the house of correction, and before the expiration of the ten days, the act was done which is charged in this indictment.

This conditional sentence was well warranted by Rev. Sts. c. 139, §§ 2, 3. Section 2 provides that the court may award against an offender "a conditional sentence, and order him to pay a fine, with or without the costs of prosecution, within a limited time, to be expressed in the sentence, and in default thereof, to suffer such imprisonment as is provided by law, and awarded by the court." Section 3 provides that the person so sentenced shall be forthwith committed, "to be detained until the sentence be complied with; and if he shall not pay the fine imposed, within the time limited, the sheriff shall cause the other part of the sentence to be executed."

This is one entire and complete sentence and judgment of the law. It neither requires nor admits any further act on the part of the court. It is a sentence to imprisonment for a term of time, determinable only by a payment within ten days. The commitment is immediate on the sentence, and the imprisonment for the ten days, unless sooner determined by payment, is as much a part of the term of imprisonment as the one year afterwards. *Wilde v. Commonwealth*, 2 Met. 408.

We have seen that the legislature make a marked distinction between those who are convicted and sentenced, and those who

are held for trial ; and this distinction, is no doubt, founded on good reason. Perhaps a prisoner is never more desperate, or animated by a more eager desire to effect his escape, than immediately after sentence. Before trial, he may have a confident expectation that he shall not be convicted on his trial, or that he shall escape with a light sentence. But after sentence, all hope of acquittal has deserted him, and the full measure of his punishment is before him. Take the case of an absolute, instead of a conditional sentence, the ordinary case of a convict sentenced to the state prison for life, or for a term of years. Some time must elapse, longer or shorter, according to circumstances, between the time of his sentence and his actual commitment. It is a part of the sentence that he stand committed until removed in execution of the sentence. We are strongly inclined to the opinion, (though it is not necessary to this decision, and I use it only for illustration,) that a forcible attempt to break jail and escape, after such sentence and before commitment to the state prison, would bring the convict within the provisions of this statute, and render him liable to punishment.

On the whole, the court are of opinion, that such an alternative sentence, rendering one liable by law to actual immediate imprisonment, and to continue for a fixed time, limited by the judgment, unless sooner determined by payment of a fine, is a sentence to imprisonment, by way of punishment, within the true intent of the statute ; and that a breach of the jail, with intent to escape, or an attempt by force and violence to escape, and so avoid the punishment thus awarded, as well the imprisonment as the fine, renders such convict liable to the punishment prescribed in this statute. Such being the case with the prisoner, John P. Briggs, he must be brought in to be sentenced on this conviction.

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THOMAS D. DYER *vs.* MOSES CLARK, Administrator,
& others.

When real estate is purchased by partners, with the partnership funds, for partnership use and convenience, although it is conveyed to them in such a manner as to make them tenants in common, yet in the absence of an express agreement, or of circumstances, showing an intent that such estate shall be held for their separate use, it will be considered and treated, in equity, as vesting in them, in their partnership capacity, clothed with an implied trust that they shall hold it, until the purposes, for which it was so purchased, shall be accomplished, and that it shall be applied, if necessary, to the payment of the partnership debts. Upon the dissolution of the partnership, by the death of one of the partners, the survivor has an equitable lien on such real estate for his indemnity against the debts of the firm, and for securing the balance that may be due to him from the deceased partner, on settlement of the partnership accounts between them; and the widow and heirs of such deceased partner have no beneficial interest in such real estate, nor in the rent received therefrom after his death, until the surviving partner is so indemnified.

BILL IN EQUITY. The plaintiff is surviving partner of the firm of Burleigh & Dyer, and the defendants are the administrator, the widow, and the minor children of the deceased partner, Stevens Burleigh. The case was heard on the bill, the answer, and a master's report, which set forth facts, of which the following is an abstract :

On the 1st of April 1835, the plaintiff and Stevens Burleigh entered into sealed articles of partnership in the business of distillers, under the name and firm of Burleigh & Dyer, and afterwards entered upon said business with equal interests, and continued the same until April 1839, when said partnership was dissolved by the decease of said Burleigh. On the 17th of October 1837, the said partners bought a distil-house, and the land under and about the same, and all the valuable fixtures thereon, suitable and necessary for carrying on said business, for the sum of \$ 19,000, and afterwards paid therefor \$ 3000 in cash, from the partnership funds, and the said estate was thereupon conveyed to them jointly, by a deed describing them as "distillers, transacting business under the firm of Burleigh & Dyer." Said real estate was purchased solely for said partnership purposes, use and convenience, as a part of their stock in trade, and on partnership account; and said partners occupied said

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estate, to the time of said Burleigh's decease, as their partnership place of business, and from time to time altered and repaired the same, and paid all the expenses thereof from the partnership funds, and always held and regarded said estate as a part of the partnership effects and property, and in no way as the separate property of said partners. At the time of the decease of said Burleigh, in 1839, the said partners were seized and possessed of said estate, subject to certain mortgages upon the same, made by them, to secure payment of certain notes given by them for \$16,000, part of the purchase money thereof; in which mortgages the wife of said Burleigh relinquished her claim to dower.

No part of the funds, that were applied to the purchase, alteration and repairs of said estate, was ever charged to said partners' respective accounts, on their books, as withdrawn by them from the funds or profits of the firm; and neither partner ever intended to withdraw any part thereof from the partnership funds.

The defendant, Clark, is administrator of the estate of said Burleigh, which is insolvent, and he has sold, under a license of the probate court, one undivided moiety of said real estate, (subject to the mortgages aforesaid,) as the individual property of his intestate, for the sum of \$1500, and executed a deed thereof to the purchaser. The widow of said Burleigh, at the same time, released to said purchaser her right of dower in said moiety, for the sum of five dollars. The plaintiff has sold the other moiety of said estate for the like sum, to the same purchaser, having first given notice to all the defendants, that such sale was not to be construed as a waiver of his claim to the whole estate, or the proceeds thereof, as partnership property.

On a settlement of the partnership accounts, the deceased partner, Burleigh, is found to have been indebted to the surviving partner, the plaintiff, in the sum of \$732, after all the partnership matters are closed; and the partnership is also insolvent, unless the proceeds, or part thereof, of the said real estate, and of the rents thereof which have accrued since said Burleigh's decease, (and which are in the plaintiff's hands, to the amount of \$800,) shall be applied to liquidate the partnership accounts, and adjust the balance due to the plaintiff, as surviving partner, from said deceased partner's estate.

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The prayer of the bill was, that the plaintiff might be allowed to retain the said rents, to be applied to the adjustment of the partnership accounts, and that the defendant, Clark, might be restrained, by injunction, from paying the proceeds of said estate to the individual creditors of said Burleigh, and be directed to pay over said proceeds to the plaintiff, as surviving partner. There was also a prayer for general relief.

Pope, for the plaintiff. The question in this case is, whether the plaintiff shall receive, in full, the debt due to him from his deceased partner, or shall be turned over to prove his debt under the commission of insolvency on the deceased's estate, and take a dividend thereon with the other creditors of the deceased.

At first view, the claim of the plaintiff may seem to have been decided against him in the case of *Goodwin v. Richardson*, 11 Mass. 469. But that case was decided in 1814, before equity powers were given to the court upon the subject of partnership matters; and it went only to the length of declaring in whom the legal title of the estate vested, and whether, under the statutes then existing, it was a joint tenancy or tenancy in common. It was not like the case at bar, inasmuch as the real estate was obtained by foreclosing a mortgage made to secure a partnership debt, and was not land purchased for partnership use and convenience. And it appears that the court understood that in equity, and under general equity powers, a different view might, for some purposes, be maintained. That case was decided upon the old St. 1785, c. 62, § 4, that required conveyances of land to two or more to be construed and adjudged to be estates in common, unless otherwise expressed.

The St. of 1823, c. 140, § 2, first gave general equity powers to this court in matters of partnership, where there was not an adequate remedy at law. The Rev. Sts. c. 81, § 3, also confer the same powers; and the case at bar is clearly within the terms of those statutes.

The general extension of business, and distribution of property, and the extended freedom of transferring real estate, in this country, contribute to increase the number of cases in which

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real estate is held for the joint purposes of partnerships, and upon which the decision of this case may operate. And there are already, in our own reports, cases in which the real estate of firms is incidentally treated as a part of the partnership stock. *Taft v. Buffum*, 14 Pick. 322. *Goddard v. Pratt*, 16 Pick. 412.

The case of *Pierce v. Jackson*, 6 Mass. 242, which was recently confirmed in *Allen v. Wells*, 22 Pick. 450, establishes the principle, that partnership funds are to be first applied to partnership debts. And it is well established, both in England and in this country, that a partner's interest in funds is his share of the surplus, after the debts of the firm are paid and a final balance ascertained, and that each partner has a lien on the funds for his share of the surplus, as well as for his indemnity against the joint debts. Gow on Part. c. 5, § 3. Collyer on Part. 65. *Harvey v. Crickett*, 5 M. & S. 336. *Hozie v. Carr*, 1 Sumner, 173. 2 Story on Eq. § 1243. 22 Pick. *ubi sup.*

The plaintiff has settled the partnership debts, and liquidated the affairs of the firm. The deceased partner's estate is indebted to him in the sum of \$732, on partnership account, and he relies on the doctrine of the courts of equity, to secure him against loss by the insolvency of the firm. His ground is, that in equity the real estate, (or the proceeds thereof, if sold,) purchased during the existence of the partnership, for partnership use, with partnership funds, is to be treated as partnership funds, and as personalty, to all intents and purposes, in the liquidation and adjustment of the partnership accounts and balances. This doctrine of the courts of equity is found throughout the elementary treatises relating to the subject, and has been declared and established in numerous reported cases in Great Britain and in the United States. Cross on Lien, 138. Collyer on Part. Book II. c. 1, § 1. 3 Kent Com. (4th ed.) 36-39, & notes. 2 Story on Eq. §§ 1243, 1244. Story on Part. §§ 91-93, 98.

The English cases to the point are *Thornton v. Dixon*, 3 Bro. C. C. 199. *Ripley v. Waterworth*, 7 Ves. 425. *Fereday v. Wightwick*, 1 Russ. & Mylne, 45. *Phillips v. Phillips*, 1 Mylne & Keen, 649. *Broom v. Broom*, 3 Mylne & Keen, 443. *Rae*

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dall v. Randall, 7 Simons, 271. *Morris v. Kearsley*, and *Bligh v. Brent*, 2 Younge & Collyer, 139, 268. The doctrine of the English courts is reviewed thoroughly, from time to time, in the above cases, and other cases are therein cited to the same general effect. The cases are reviewed in the London "Law Magazine" for Feb. 1840, Vol. 23, pp. 98-107, and the conclusion drawn by the writer is, that "if land be purchased out of partnership moneys, for the use and convenience of the partnership, and in order that the same may be used for some purpose of their joint trade, it is only real estate as long as the partnership requires it as such, and on a dissolution, the shares of the respective partners therein are personal estate."

The English courts of equity have proceeded in this way to protect the interest of creditors of the firm; and though the creditors have no lien on the partnership property, the courts work out a lien for them, through the surviving partner's lien. 2 Story on Eq. § 1253. As they hold that the real estate of the firm, purchased for partnership use and account, and out of partnership funds, is subject to the same rules as other partnership property, they give the broadest extension to the rule which first applies partnership property to partnership debts.

The same doctrine has been discussed and applied in the courts of the United States. In *Hoxie v. Carr*, 1 Sumner, 173, a case hardly distinguishable from the one at bar, Mr. Justice Story gave the weight of his authority to the doctrine of the English courts. The same principles came into discussion in Connecticut, in 1828, and were adopted and applied. *Sigourney v. Munn*, 7 Connect. 11. And the general rules of law, applicable to the personal property of a firm, have been applied, in equity, to partnership real estate, in the various courts of the Union. *Savage v. Carter*, 9 Dana, 410. *Greene v. Greene*, 1 Ham. 542. *Marvin v. Trumbull*, Wright, 386. *Richardson v. Packwood*, 13 Martin, 290. *Donaldson v. Cape Fear Bank*, 1 Dev. Eq. Rep. 103. *Forde v. Herron*, 4 Munf. 316. *Richardson v. Wyatt*, 2 Desaus. 471. *Philips v. Crammond*, 2 Wash C. C. 441. *Wooldridge v. Wilkins*, 3 V. E. Howard, 360.

The plaintiff is not concerned to contest the right of his

deceased partner's widow to dower in the real estate. Some of the cases above cited are decisive against such right. But if the estate be treated as personalty, so far as the plaintiff's claim on the estate of the deceased is in question, it is immaterial to him whether the widow has, or has not, a right to dower in the equity of redemption; for he will receive enough to cover that claim, though dower should be set off to her.

G. T. Curtis, for the defendants. This case presents two questions on the part of the defendants. 1. Whether lands purchased for partnership use, out of partnership funds, are in this Commonwealth to be treated, on the death of one of the partners, as partnership property, of the nature of personal estate; or whether they are to retain, throughout, the character of real property, and the share of each partner go to his representatives. 2. Whether, in either event, the widow of such deceased partner is entitled to dower in such lands.

1. The first question, as it arises in the present case, depends wholly on the general principles of law. There is nothing in the articles of partnership, or elsewhere, to affect this real estate with any agreement. The administrator of the deceased partner has sold the estate for the benefit of his creditors, under an order of the probate court, and holds the proceeds, as their representative. The widow and heirs of the deceased also assert their claims on the fund.

In England, this question, as between the representatives of a deceased partner and the partnership itself, seems to have been first raised before Lord Thurlow, in *Thornton v. Dixon*, 3 Bro. C. C. 199. The doctrine there held was, that though a partnership agreement may vary the nature of real property, yet, in order to do so, the agreement must be express: That if the agreement be, that on dissolution the lands shall be valued and sold, it would convert them into personalty of the partnership; but that, if the agreement be not explicit enough for this purpose, "the property would result according to its respective nature, — the real as real, the personal as personal estate." This doctrine is the starting-point of the present question. It was equitable, and had many reasons in its favor; one of which is, that it does

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not withdraw real property from the operation of the laws of distribution and other incidents that follow it at common law. But this doctrine, after having been followed by some equity judges, has since been shaken in England. It was followed by Sir William Grant, in *Bell v. Phyn*, 7 Ves. 453, where real estate, purchased with a partnership fund, was held to have descended to the heir, against the claim of a residuary legatee, and to be subject to dower : Also in *Balmain v. Shore*, 9 Ves. 500, where a purchase, by partners, of real estate, to them and their respective heirs, as tenants in common, with covenants against alienation and partition, was held not to alter the nature of the property. In *Cookson v. Cookson*, 8 Simons, 520. the same general doctrine was followed.

But the courts of equity in England have changed this doctrine, in some degree. The case of *Ripley v. Waterworth*, 7 Ves. 425, is said by Collyer, in his work on partnership, p. 72, to have paved the way for the modern doctrine. But in that case, it is observable, it was held that an estate of freehold, holden for the purposes of the partnership, shall descend, in equity, as personal, if it appear *by express agreement* to have been the intention of the parties that it should be converted into personalty. So in *Crawshay v. Maule*, 1 Swanst. 521, Lord Eldon said, "for ordinary purposes, a lease is no more than stock in trade, and as a part of the stock may be sold ; nor would it be material that the estate purchased by a partnership was freehold, *if intended only as an article of stock ; though a question might in that case arise, on the death of a partner, whether it would pass as real estate, or as stock, personal estate in enjoyment, though freehold in nature and quality.*" And he refers to the older cases, above cited, and to some others.

The doctrine that the real estate of a partnership is to be considered as part of the capital, and has the quality of personal estate, is countenanced by the cases of *Fereday v. Wightwick*, 1 Russ. & Mylne, 45 ; *Phillips v. Phillips*, 1 Mylne & Keen, 649 ; and *Townsend v. Devaynes*, reported in p. 97 of the notes to 1 Montagu on Partnership. But the English authorities lay stress upon the fact, that the partners have, *by their agreement*,

purposely impressed upon the real estate the character of personality. That it is to descend as personality, in the absence of any such agreement, is not clear in England ; and Mr. Justice Story remarks, that the doctrine is open to many distressing doubts. Story on Part. § 93.

In this country, there have been contradictory decisions ; but the weight of authority is believed to be against the claim of the plaintiff. In the case of *Sigourney v. Munn*, 7 Connect. 11, cited on the other side, the land was affected by a special agreement that it should be held as partnership stock. The case of *Hoxie v. Carr*, 1 Sumner, 173, stands opposed to other cases. *Yeatman v. Woods*, 6 Yerg. 20, treats real estate, so situated, as real, and descending to the heir of the deceased partner. In *Coles v. Coles*, 15 Johns. 159, it was held that where one partner sells real estate of the partnership, the other may maintain assumpsit against him for his share of the proceeds. See also *Blake v. Nutter*, 1 Appleton, 16. The case of *Smith v. Jackson*, 2 Edw. Ch. 28, is directly in point against the plaintiff's claim.

The case of *Goodwin v. Richardson*, 11 Mass. 469, is almost precisely the same as the one at bar. Mr. Justice Story, in *Hoxie v. Carr*, said this case was a mere decision at law, upon a legal title. This is true of part of the case ; it being necessary to ascertain what and in whom the legal title was. But on examination of the facts and the opinion of the court, it will be found that much of the reasoning proceeds upon equitable considerations. In that case, as in the present case, the real estate was purchased with partnership funds : The deceased partner's administrator sold his undivided half of the estate : The partnership was insolvent ; and the survivor, for the benefit of the joint creditors, brought assumpsit against the administrator for the fund in his hands. The court proceeded first to ascertain the legal title, and found that the partners were tenants in common ; the court then inquired whether it should make any difference that the estate was paid for out of partnership funds. " However this may be," the court say, " whilst both parties were living, and although a court of chancery might, in that case, apply real estate, so purchased, to the discharge of the

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joint debts ; yet in the present case, the death of one partner removes the only equitable motive or reason for such a disposition of this property." The court then proceed to show that the joint creditors have the same remedy against the share of the deceased partner in the hands of his administrator, as if such partner alone had been their debtor ; and remark, that it would be most unjust towards his *separate* creditors, if an estate, which was legally his property, should, under such circumstances, be taken out of the only fund to which they could resort, and be applied to increase the dividend of the joint creditors.

In the case at bar, the partners were tenants in common of the real estate. Rev. Sts. c. 59, §§ 10, 11. The legal title of one undivided half was in the deceased partner. What "equitable motive or reason" is there for withdrawing this estate from the fund to which his separate creditors may resort, and applying it to the plaintiff's claim, which did not exist in *Goodwin v. Richardson* ? The joint creditors may resort to it *pari passu* with the separate creditors ; and if the plaintiff has paid those joint creditors, and has a balance against his partner's estate, he may resort to it also *pari passu* with the other creditors of the deceased.

It is said that the principle, by which joint property is to be first applied to joint debts, requires that this fund should be paid over to the plaintiff. This is true, as applied to property clearly ascertained to be joint property ; but it is submitted that this is not the case with land which stands unaffected by any agreement how it shall be held or how it shall be treated on a dissolution of the partnership. In the case of *Goodwin v. Richardson*, this same consideration was pressed upon the court, viz. that the fund in the hands of the administrator ought to be applied to the joint debts, — the plaintiff suing for the benefit of the joint creditors. Yet the court did not think the property there subject to the operation of this principle. And it is difficult to distinguish the property in the present case from that ; both being held under a tenancy in common, and purchased with partnership funds. The only distinction is, that in the one case the lands were purchased for the firm to conduct its business upon, and in the

other, the lands were taken for a partnership debt ; both equally for partnership purposes.

2. The next question is, whether Mrs. Burleigh is entitled to dower in this land ; and if so, whether it is not a charge upon the fund in the hands of the defendant, Clark, the administrator. By Rev. Sts. c. 60, § 1, the wife is entitled to dower at common law, in *the lands* of her husband ; and at common law the wife is said to be dowable of all estates of inheritance, of which her husband was seized during the coverture, of which any issue which she might have had, might by possibility have been heir 2 Bl. Com. 131. The case of *Goodwin v. Richardson* is authority to show that land, bought with partnership funds and conveyed to the partnership, is an estate of inheritance ; and the partners being tenants in common, each has a legal title, as well as beneficial ownership ; and the wife of each must be dowable of a moiety. The following cases are in point, and in favor of dower in partnership lands. *Bell v. Phyn*, 7 Ves. 453. *Smith v. Smith*, 5 Ves. 189. *Smith v. Jackson*, 2 Edw. Ch. 28.

In the present case, the sum paid by the purchaser was the full value of an undivided half of the land, and he bought with the understanding that the sum paid by him covered the right of dower. The widow released without being aware that she had any further claim on the land, and the sum of five dollars was presented to her for executing the deed. Under these circumstances, it seems clear that the dower is to be charged on the purchase money, which was understood and intended by the parties as the full value of one half of the estate, and was so in fact. It is submitted, that even if the plaintiff is entitled to any portion of this money, it is only after the widow's claim has been paid.

If the court should hold that the real estate is to be treated as partnership property, still there is no inconsistency in considering it as subject to the widow's dower. The only effect of treating it as partnership property is to give the partnership creditors, including the surviving partner, a preference over the separate creditors. As land is always assets for the payment of debts, in default of personal property, and the debts of the firm are

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also debts of the deceased partner, the application of the land to the partnership debts is only a marshalling of the assets in favor of one class of creditors, who have a more equitable right to this particular fund. But it would be going very much further, to divest the widow of a legal estate of freehold, or at least of a right to such an estate, which she acquired by her husband's seizin of the estate. It is not perceived how a court of chancery could do this, unless upon the ground that the land was held by the husband merely as trustee for the partnership; and there would be great difficulties in such a construction.

Pope, in reply. The early cases doubtless laid great stress upon a direct agreement between partners respecting their real estate. But the cases cited for the defendants do not maintain the position that such agreement is the basis of the equity interposition of the English courts in recent times. *Cookson v. Cookson*, 8 Simons, 529, the only case of late date, which has been cited, does not support this doctrine. The lands, in that case, were not purchased with partnership capital, but were the property of a partner who afterwards took his son into partnership with him; and the main point decided seems to have been, what all will concede, viz. that the affairs of the firm being liquidated, the property descended to the heirs of the father, as realty. On the other hand, the cases cited for the plaintiff, in the opening, and especially *Phillips v. Phillips*, 1 Mylne & Keen, 649, show that the English decisions do not stand upon any express agreement of the partners.

The *intention* of the parties to make real estate, purchased with partnership capital, partnership stock, is the real foundation of the decisions; and where the parties have expressly covenanted to make their realty partnership stock, such intention is doubtless the most clearly proved. But in the absence of such express agreement, the courts, desiring to secure the prior right of partnership creditors to payment out of the partnership capital, have presumed it to be the intent of the partners to make their real estate, so purchased, held and used for purposes of joint trade, a part of their partnership effects.

In many kinds of partnership business, it is difficult to see

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how the rights of partners, or of their partnership creditors, can be maintained, without the exercise of such equity powers, if the purchase of real estate, which is indispensably necessary for a successful prosecution of their joint business, is to be construed as a division *pro tanto* of the funds applied to such purchase. As the law gives the creditors of the firm a priority of claim to the partnership effects, it would seem to be the more rational and equitable rule, to presume, in the absence of evidence to the contrary, that partners intend that such real estate should be partnership stock, and to leave parties, who intend to make such estate individual property, to establish that intent. In *Hoxie v. Carr*, 1 Sumner, 181, Story, J. says, "the circumstance, that the payment has been made out of the partnership funds, especially if the property be necessary for the ordinary operations of the partnership business, and be actually so employed, will afford a very cogent presumption that it was intended to be held as partnership property; and in the absence of all countervailing circumstances, it will be absolutely decisive."

Whatever may have been the special facts, in the case of *Sigourney v. Munn*, 7 Connect. 11, Hosmer, C. J. gave his unqualified assent to the doctrine laid down in *Phillips v. Phillips* and *Hoxie v. Carr*, that land, purchased with partnership funds for partnership use, is to be treated as partnership stock.

The case cited from the Tennessee reports, *Yeatman v. Woods*, 6 Yerg. 20, was decided in opposition to the principles for which the plaintiff contends. That decision, however, was made with manifest reluctance, and solely upon the authority of the earlier case of *M^r Alister v. Montgomery*, 3 Hayw. 94. And in 1841, the supreme court of Tennessee expressly recognized a contrary doctrine, in the case of *Hunt v. Benson*, 2 Humph. 459.

Coles v. Coles and *Blake v. Nutter* were actions at law; and it is difficult to see how they could have been decided differently in a court of law. In *Smith v. Jackson*, 2 Edw. Ch. 28, the land was not purchased for partnership use and convenience, but was taken to secure payment of a partnership

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debt. But even that case distinctly negatives the doctrine that an express agreement between partners is necessary to convert their real estate into personal and partnership effects. "The equitable interest in such property," says the vice-chancellor, "arising from an express agreement *or the clear and manifest intent of the parties*, is to be deemed part of the partnership stock, subject to the partnership debts, and liable to be applied accordingly." The doctrine laid down in that case, restrained as it evidently was by the case of *Coles v. Coles*, differs from *Hoxie v. Carr*, only in not stating what is to be the evidence of such intention, and in not declaring whether the purchase of lands with partnership capital, for partnership use, should be deemed, in the absence of contradictory circumstances, a conclusive presumption of such intention.

It is asked, what more equitable reason is there for separating the fund now in question from the individual property of the deceased partner, than existed for doing so in the case of *Goodwin v. Richardson*? There is one material difference in the cases. In that case, the land was not purchased for partnership use, but was taken by foreclosure of a mortgage made to secure a partnership debt; while in the case at bar, the land was purchased solely for partnership use. And such purchase for such use is one of the material and necessary elements of the cases in which the land is held, in courts of equity, to be partnership stock.

SHAW, C. J. This is a suit in equity by the surviving partner of the firm of Burleigh & Dyer, established by articles of copartnership, under seal, for the purpose of carrying on the business of distillers. The principal question is one which has arisen in several other cases, and is this; whether real estate, purchased by copartners, from partnership funds, to be held, used and occupied for partnership purposes, is to be deemed in all respects real estate, in this Commonwealth, to vest in the partners severally as tenants in common, so that on the decease of either, his share will descend to his heirs, be chargeable with his wife's dower, and in all respects held and treated as real estate, held by the deceased partner as a tenant in com-

mon ; or, whether it shall be regarded as *quasi* personal property, so as to be held and appropriated as personal property, first to the liquidation and discharge of the partnership debts, and to the adjustment of the partnership account, and payment of the amount due, if any, to the surviving partner, before it shall go to the widow and heirs of the deceased partner. This is a new question here, and comes now to be decided, for the first time.

There are some principles, bearing upon the result, which seem to be well settled, and may tend to establish the grounds of equity and law, upon which the decision must be made. It is considered as established law, that partnership property must first be applied to the payment of partnership debts, and therefore that an attachment of partnership property for a partnership debt, though subsequent in time, will take precedence of a prior attachment of the same property for the debt of one of the partners. It is also considered, that however extensive the partnership may be, though the partners may hold a large amount and great variety of property, and owe many debts, the real and actual interest of each partner in the partnership stock is the net balance which will be coming to him after payment of all the partnership debts and a just settlement of the account between himself and his partner or partners. 1 Ves. sen. 242.

The time of the dissolution of a partnership fixes the time at which the account is to be taken, in order to ascertain the relative rights of the partners, and their respective shares in the joint fund. The debts may be numerous, and the funds widely dispersed and difficult of collection ; and therefore much time may elapse, before the affairs can be wound up, the debts paid, and the surplus put in a condition to be divided. But whatever time may elapse before the final settlement can be practically made, that settlement, when made, must relate back to the time when the partnership was dissolved, to determine the relative interests of the partners in the fund.

When, therefore, one of the partners dies, which is *de facto* a dissolution of the partnership, it seems to be the dictate of natural equity, that the separate creditors of the deceased part

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ner, the widow, heirs, legatees, and all others claiming a derivative title to the property of the deceased, and standing on his rights, should take exactly the same measure of justice, as such partner himself would have taken, had the partnership been dissolved in his life-time; and such interest would be the net balance of the account, as above stated.

Such indeed is the result of the application of the well known rules of law, when the partnership stock and property consist of personal estate only. And as partnerships were formed mainly for the promotion of mercantile transactions, the stock commonly consisted of cash, merchandize, securities, and other personal property; and therefore the rules of law, governing that relation, would naturally be framed with more especial reference to that species of property. It is therefore held, that on the decease of one of the partners, as the surviving partner stands chargeable with the whole of the partnership debts, the interest of the partners in the chattels and choses in action shall be deemed so far a joint tenancy, as to enable the surviving partner to take the property by survivorship, for all purposes of holding and administering the estate, until the effects are reduced to money, and the debts are paid; though, for the purpose of encouraging trade, it is held that the harsh doctrine of the *jus accrescendi*, which is an incident of joint tenancy, at the common law, as well in real as in personal estate, shall not apply to such partnership property; but, on the contrary, when the debts are all paid, the effects of the partnership reduced to money, and the purposes of the partnership accomplished, the surviving partner shall be held to account with the representatives of the deceased for his just share of the partnership funds.

Then the question is, whether there is any thing so peculiar in the nature and characteristics of real estate, as to prevent these broad principles of equity from applying to it. So long as real estate is governed by the strict rules of the common law, there would be, certainly, great difficulty in shaping the tenure of the legal estate in such form as to accomplish these objects. Should the partners take their conveyance in such mode as to create a joint tenancy, as they still may, though contrary to the

policy of our law, still it would not accomplish the purposes of the parties ; first, because either joint tenant might, at his option, break the joint tenancy and defeat the right of survivorship, by an alienation of his estate, or (what would be still more objectionable) the right of survivorship at the common law would give the whole estate to the survivor, without liability to account, and thus wholly defeat the claims of the separate creditors, and of the widow and heirs of the deceased partner.

But we are of opinion, that the object may be accomplished in equity, so as to secure all parties in their just rights, by considering the legal estate as held in trust for the purposes of the partnership ; and since this court has been fully empowered to take cognizance of all implied as well as express trusts, and carry them into effect, there is no difficulty, but on the contrary great fitness, in adopting the rules of equity on the subject, which have been adopted for the like purpose, in England and in some of our sister States. And it appears to us, that considering the nature of a partnership, and the mutual confidence in each other, which that relation implies, it is not putting a forced construction upon their act and intent, to hold that when property is purchased in the name of the partners, out of partnership funds and for partnership use, though by force of the common law they take the legal estate as tenants in common, yet that each is under a conscientious obligation to hold that legal estate, until the purposes for which it was so purchased are accomplished, and to appropriate it to those purposes, by first applying it to the payment of the partnership debts, for which both his partner and he himself are liable, and until he has come to a just account with his partner. Each has an equitable interest in that portion of the legal estate held by the other, until the debts, obligatory on both, are paid, and his own share of the outlay for partnership stock is restored to him. This mutual equity of the parties is greatly strengthened by the consideration, that the partners may have contributed to the capital stock in unequal proportions, or indeed that one may have advanced the whole. Take the case of a capitalist, who is willing to put in money, but wishes to take no active concern in the conduct of

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business, and a man who has skill, capacity, integrity and industry to make him a most useful active partner, but without property, and they form a partnership. Suppose real estate, necessary to the carrying on of the business of the partnership, should be purchased out of the capital stock, and on partnership account, and a deed taken to them as partners, without any special provisions. Credit is obtained for the firm, as well on the real estate as the other property of the firm. What are the true equitable rights of the partners, as resulting from their presumed intentions, in such real estate? Is not the share of each to stand pledged to the other, and has not each an equitable lien on the estate, requiring that it shall be held and appropriated, first to pay the joint debts, then to repay the partner who advanced the capital, before it shall be applied to the separate use of either of the partners? The creditors have an interest, indirectly, in the same appropriation; not because they have any lien, legal or equitable, (2 Story on Eq. § 1253,) upon the property itself; but on the equitable principle, which determines that the real estate, so held, shall be deemed to constitute part of the fund from which their debts are to be paid, before it can be legally or honestly diverted to the private use of the partners. Suppose this trust is not implied, what would be the condition of the parties, in the case supposed, in the various contingencies which might happen? Suppose the elder and wealthy partner were to die: The legal estate descends to his heirs, clothed with no trust in favor of the surviving partner: The latter, without property of his own, and relying on the joint fund, which, if made liable, is sufficient for the purpose, is left to pay the whole of the debt, whilst a portion, and perhaps a large portion, of the fund bound for its payment, is withdrawn. Or suppose the younger partner were to die, and his share of the legal estate should go to his creditors, wife or children, and be withdrawn from the partnership fund; it would work manifest injustice to him who had furnished the fund from which it was purchased. But treating it as a trust, the rights of all parties will be preserved; the legal estate will go to those entitled to it, subject only to a trust and equitable lien to the surviving part

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ner, by which so much of it shall stand charged as may be necessary to accomplish the purposes for which they purchased it. To this extent, and no further, will it be bound ; and subject to this, all those will take, who are entitled to the property ; namely, the creditors, widow, heirs, and all others standing on the rights of the deceased partner.

It may happen that real estate may be so purchased by partners, and out of partnership funds, in such manner as to preclude such implied trust, and indicate that the parties intended to purchase property to be held by them separately for their separate use ; as where there is such an express agreement at the time of the purchase, or a provision in the articles of copartnership, or where the price of such purchase should be charged to the partners respectively, in their several accounts with the firm. This would operate as a division and distribution of so much of the funds, and each would take his share divested of any implied trust. If, in the conveyance, the grantees should be described as tenants in common, it would be a circumstance bearing on the question of intent, though perhaps it might be considered a slight one ; because those words would merely make them tenants in common of the legal estate, which, by operation of law, they would be without them. But, as we have already seen, such legal estate is not at all incompatible with an implied trust for the partnership.

The result of this part of the case seems to us to be this ; that when, by the agreement and understanding of partners, their capital stock and partnership fund consist, in whole or in part, of real estate — inasmuch as it is a well known rule governing the relation of partnership, that neither partner can have an ultimate and beneficial interest in the capital until the debts are paid and the account settled ; that both rely upon such rule and tacitly claim the benefit of it, and expect to be bound by it ; the same rule shall extend to real estate. The same mutual confidence, which governs the relation in other respects, extends to this ; and, therefore, when real estate is purchased as part of the capital, whether by the form of the conveyance the legal estate vests in them as joint tenants or tenants in common, it vests in them

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and their respective heirs, clothed with a trust for the partners, in their partnership capacity, so as to secure the beneficial interest to them until the purposes of the partnership are accomplished. It follows, as a necessary consequence, that such partnership real estate cannot be conveyed away and alienated by one of the partners alone, without a breach of such trust; and that such a conveyance would not be valid against the other partner, unless made to one who had no notice, actual or constructive, of the trust. But, if a person knows that a particular real estate is the partnership property of two or more, and he attempts to acquire a title to any part of it from one alone, without the knowledge or consent of the other, there seems to be no hardship in holding that he takes such title at his peril, and on the responsibility of the person with whom he deals.

But we think the same conclusion is well supported by authorities, although there has been some diversity of opinion amongst the earlier cases.

The adjudged cases were so fully examined by the counsel in their arguments, that it is unnecessary to state them in detail. The principles, which have already been suggested as the grounds on which we decide the present case, were applied in *Phillips v. Phillips*, 1 Mylne & Keen, 649; *Broom v. Broom*, 3 Mylne & Keen, 443; *Sigourney v. Munn*, 7 Connect. 11; and *Hoxie v. Carr*, 1 Sumner, 173. In these cases, all the previous decisions on the subject were carefully considered. See also 3 Kent Com. (4th ed.) 36-39. 1 Story on Eq. §§ 674, 675. 2 ib. § 1207. Collyer on Part. 76. Cary on Part. 27, 28. *Houghton v. Houghton*, 11 Simons, 491.

It has been supposed that the case of *Goodwin v. Richardson*, 11 Mass. 469, stands opposed to the decision now made. I do not think it does. That case was decided in 1814, before equity powers existed in this Commonwealth, on the general subject of trusts. It was in terms a question as to the vesting of the real estate; and the court were bound to decide the case for the defendant, if they found, upon the facts, that the estate in question had vested in the partners, on foreclosure, as tenants in common. Had they decided the other way, they must have decided that

partners, taking real estate in satisfaction of a partnership debt, by foreclosing a mortgage, would hold the estate as joint tenants, with right of survivorship at law, without liability to account — a principle directly opposed to the *St.* of 1785, c. 62, respecting joint tenancy ; because in that case and at that time the real estate must descend and vest according to the rules of law, and there was no court of equity competent to require the surviving partner to account with the representatives of the deceased party.

In that case, as it happened, both the separate estate and the partnership estate were insolvent, and therefore good justice would have been done, in deciding that the plaintiff should recover for the benefit of the partnership creditors. But the court were deciding upon a rule of law, which must apply to all cases, and they could not have decided that for the plaintiff without holding that all such estate, held by partners, should be deemed joint estate, with a right of survivorship at law, and without liability to account ; a rule opposed to the plainest principles of equity, and to the spirit, if not to the letter, of the statute respecting joint tenancy. The court were dealing solely with a question of law, in determining a legal estate, and intimate that a court of equity might make joint real estate applicable, as personal, to the payment of partnership debts. We consider, therefore, that that decision is not opposed to the decision, upon equitable principles, to which we now propose to come.

On the facts of the present case, we are of opinion that the real estate in question was a part of the capital stock purchased out of the partnership funds, for the partnership use, and for the account of the firm. The partners entered into articles, as distillers. The business required a large building and fixtures, which they purchased and paid for in part out of the joint funds, and gave notes in the partnership name for the remainder of the price, and the estate was regarded by them as partnership effects. The repairs and improvements were also charged to joint account. These are all decisive indications of joint property.

The plaintiff has received a sum in rents and profits that have accrued since his partner's death. The defendant, Clark, as administrator of Burleigh, the deceased partner, has sold an undi-

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vided half of the property as his, under a license, and with the assent of the plaintiff. The widow joined to release her dower, for a nominal sum. But we cannot perceive that the right of the widow is distinguishable from that of the creditors and heirs of the deceased partner. As far as this estate was held in trust by her deceased husband, she was not entitled to dower. For all beyond that, she will be entitled, because he held it as legal estate, unless she is barred by her release ; of which we give no opinion.

The plaintiff is entitled to a decree charging the amount of rents and profits in his hands, and so much of the proceeds of the sale made by the administrator, as will be sufficient to discharge the balance of the partnership account ; and the rest of the proceeds will remain in the hands of Clark, the administrator of Burleigh, to be distributed according to law.

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MARY HOWARD & others vs. JOHN L. PRIEST & another.

Real estate, purchased by partners, with the partnership funds, for the partnership business, is considered in equity as partnership stock, and is to be applied, if necessary, towards payment of the partnership debts ; and the widows of the partners are not entitled to dower in such estate, nor are the heirs of the partners entitled to the rents and profits of such estate which accrue after the death of their ancestor, if the estate and such rents thereof are required for payment of the partnership debts.

Under *St. 1838, c. 163*, the assignees of an insolvent debtor, who is surviving partner of a firm, are entitled, as against the widow and heirs of the deceased partner, to all the real estate of the partners, which was purchased with the partnership funds, for the partnership business, and to the rents and profits thereof, to be applied towards payment of the debts of the firm.

THIS was an action of assumpsit on the money counts, brought by the widow and children of Abraham Howard, deceased, and was submitted to the court on the following agreed statement of facts :

“ In the year 1826, Abraham Howard and Robert D. C. Merry partners in business, under the firm of Howard & Merry, purchased store No. 39, Central Wharf, Boston, with eight shares in the corporate stock of the Central Wharf and Wet Dock Corporation ; which shares, by the charter of said corpo

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ration, (St. 1814, c. 172, § 4,) are 'in all respects real estate.' In 1832, the said Howard & Merry, being then partners as aforesaid, purchased a parcel of land and a store in Moon Street, Boston. Both the deeds of conveyance were made to said Abraham Howard and Robert D. C. Merry, and their heirs and assigns for ever; and the deed of the store on Central Wharf, with the shares aforesaid, described the grantees as 'merchants and copartners, doing business under the firm of Howard & Merry.' The whole of said estates was purchased with the funds of said firm, and they were so entered on the books of the firm, at the time of the purchase, and continued to be entered in the accounts of stock, taken in writing by the firm, from time to time during the continuance of the partnership, as a part of the property of the firm. All the expenses incurred on account of said real estate were charged to said partnership, in their books; and all the rents, storage, and dividends received from said stores and shares, were credited to said partnership, in their books.

"This property was purchased by Howard & Merry for their partnership purposes, and was used by them for their own goods, and also for taking the goods of others on storage; and said partners occupied the counting room in said store on Central Wharf, from the time it was purchased until the partnership was dissolved by the death of Howard, in January 1840. Said firm were solvent, when such purchases were made, and so continued till 1837. After the decease of Howard, the surviving partner, Merry, filed a petition, on the 14th of April 1840, for the benefit of the insolvent act of 1838, c. 163, upon which such proceedings were had, that the defendants in this suit, J. L. Priest and Franklin Story, were appointed assignees of said Merry's estate, and his individual estate and the partnership estate of Howard & Merry were transferred to them by a master in chancery. The defendants have received rents from said stores, and dividends from said shares, to the amount of \$3000, and the plaintiffs claim one moiety thereof as belonging to them. On the 17th of February 1840, an administrator was appointed on the estate of said Howard; but he had not sold the real estate belonging to said How-

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ard, at the time when the abovementioned rents and profits accrued.

“ A demand has been made, in due form, by said Mary Howard, to have her dower set off in the premises, and also by all the plaintiffs for the rents and profits claimed in this suit. The parties have agreed upon the value in money, of Mrs. Howard's dower, if she is entitled to dower. And if the plaintiffs, or either of them, be entitled to recover any thing, in any form of action, or by any process in equity, against which the defendants have no claim for relief in equity, in this court, judgment is to be rendered for the plaintiffs, for that amount ; the court stating how much belongs to the widow, and how much to the heirs : But if the court shall be of opinion that neither of the plaintiffs can recover any thing of the defendants, in any form of action or proceeding, at law or in equity, except where the defendants have a claim for relief in equity, in this court, judgment is to be rendered for the defendants.”

C. G. Loring & W. Gray, for the plaintiffs.

Nichols, for the defendants.

The only authorities cited by the counsel, which were not cited in the next preceding case of *Dyer v. Clark*, were the following : *For the plaintiffs*, the case of *Gibson v. Farley*, 16 Mass. 280, that they were entitled to the rents and profits claimed ; and *Vose v. Grant*, 15 Mass. 522, that the equity powers conferred on the court did not alter the law, as it stood before, and that, as there was no trust before, in a case like the present, the equity jurisdiction of the court, as to trusts, did not reach this case. It was also urged for the plaintiffs, that it would be contrary to the policy of the registry law to hold that there was a trust in this case ; that law requiring that the title to real estate shall appear in the deeds thereof, and on record. *Hale v. Henrie*, 2 Watts, 143. *For the defendants*, 1 Roper Husb. & Wife, 353. *Leach v. Leach*, 18 Pick. 76. *Washburn v. Goodman*, 17 Pick. 537. *Edgar v. Donnally*, 2 Munf. 387. *Deloney v. Hutcheson*, 2 Rand. 186. *Baird v. Baird*, 1 Dev. & Bat. Eq. Rep. 524. *Lyster v. Dolland*, 1 Ves. jr. 435. *Selkrig v. Davies*, 2 Dow, 242.

SHAW, C. J. The principles and authorities on which we think this case must rest have been so fully presented and considered, in the case of *Dyer v. Clark*, (*ante*, 562,) decided at the present term, that we do not think it necessary to state them at large. We are of opinion, that the conclusion to which they lead is, that real estate purchased out of partnership funds, to be used and applied to partnership purposes, and considered and treated by the partners as part of the partnership stock, is to be deemed and considered, so far as the legal title is in question, as estate held in common, and not in joint tenancy; but as to the beneficial interest, it is held in trust, each holding his property in trust for the partnership, until the partnership account is settled, and the partnership debts paid. It is a trust arising from the actual or implied agreement of the parties, and from the mutual relation in which they stand to each other. It shall not be construed a joint tenancy at law, because it would be contrary to the policy of the law, by giving a *jus accrescendi* at common law, in case of survivorship, when no such intent or purpose can be presumed. *St.* 1785, c. 62, § 4. The rule of holding it a trust estate, in regard to partners, is founded on the equity of the surviving partner, who, being made chargeable with all the debts of the firm, ought to have the control of all the partnership property, as assets, first, for the payment of the debts of the firm; and secondly, for the restoration to himself, on settlement of the partnership account, of that part of the capital which has been contributed by him to the common stock.

The true and actual interest of each partner in the common stock is the balance found due to him after the payment of debts and the adjustment of the partnership account. There seems to be no reason in equity, why this first distribution of the common stock should be defeated, because, by mutual agreement, the partners, for their own use and convenience, have invested a part of that common stock in real estate. And as the widow and heirs can claim only in right of the husband and father, such derivative right, in equity, will extend no further in behalf of the wife and children, than that of the partner from whom it was derived. As this was real estate purchased by the partners, after

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the formation of the partnership, as it was paid for out of the partnership funds, purchased for partnership use, and entered in their books and otherwise treated as partnership stock, until the decease of one of the partners, we are of opinion that the surviving partner had an equitable lien upon the property of the deceased partner ; that the heirs took the legal estate, subject to a trust and equitable lien in favor of the surviving partner ; and that the widow was not entitled to her dower, nor the heirs at law to the rents and profits, until this trust was fully executed and fulfilled. [See *Burnside v. Merrick*, 4 Met. 537, which was under consideration at the same time with the present case.]

Judgment for the defendants

SUPPLEMENT.

the mere facts, that a student, who has a domicile in one town, resides at a public institution in another town, for the sole purpose of obtaining an education, and that he has his means of support from another place, do not constitute a test of his right to vote and his liability to be taxed in the latter town. He obtains this right and incurs this liability only by a change of domicile ; and the question, whether he has changed his domicile, is to be decided by all the circumstances of the case.

To the Honorable the House of Representatives of the Commonwealth of Massachusetts :

The undersigned, justices of the supreme judicial court, have taken into consideration the question upon which their opinion was requested by the Honorable House, by their order of the 10th of March instant, in the words following :

“ Is a residence at a public institution, in any town in this Commonwealth, for the sole purpose of obtaining an education, a residence within the meaning of the constitution, which gives a person, who has his means of support from another place, either within or without this Commonwealth, a right to vote, or subjects him to the liability to pay taxes in such town ? ”

And in answer thereto, we respectfully submit the following opinion :

We feel considerable difficulty in giving a simple or direct answer to the question proposed, because neither of the circumstances stated constitutes a test of a person's right to vote, or liability to be taxed ; nor are they very decisive circumstances bearing upon the question. On the contrary, a person may, in our opinion, reside at a public institution for the sole purpose of obtaining an education, and may have his means of support from another place, and yet he will, or will not, have a right to vote in the town where such institution is established, according

to circumstances not stated in the case on which the question is proposed.

By the constitution it is declared, that, to remove all doubts concerning the meaning of the word "inhabitant," every person shall be considered an inhabitant, for the purpose of electing and being elected into any office or place within this State, in that town, district or plantation, where he dwelleth, or hath his home.

In the third article of the amendments of the constitution, made by the convention of 1820, the qualification of inhabitancy is somewhat differently expressed. The right of voting is conferred on the citizen *who has resided* within this Commonwealth, and *who has resided* within the town or district, &c.

We consider these descriptions, though differing in terms, as identical in meaning, and that "inhabitant," mentioned in the original constitution, and "one who has resided," as expressed in the amendments, designate the same person. And both of these expressions, as used in the constitution and amendment, are equivalent to the familiar term domicile, and therefore the right of voting is confined to the place where one has his domicile, his home or place of abode.

The question, therefore, whether one residing at a place where there is a public literary institution, for the purposes of education, and who is in other respects qualified by the constitution to vote, has a right to vote there, will depend on the question whether he has a domicile there. His residence will not give him a right to vote there, if he has a domicile elsewhere; nor will his connection with a public institution, solely for the purposes of education, preclude him from so voting, being otherwise qualified, if his domicile is there.

The question, what place is any person's domicile, or place of abode, is a question of fact. It is in most cases easily determined by a few decisive facts; but cases may be readily conceived, where the circumstances tending to fix the domicile are so nearly balanced, that a slight circumstance will turn the scale. In some cases, where the facts show a more or less frequent or continued residence in two places, either of which would be conclusively considered the person's place of domicile.

but for the circumstances attending the other, the intent of the party, to consider the one or the other his domicile, will determine it. One rule is, that the fact and intent must concur. Certain maxims on this subject we consider to be well settled, which afford some aid in ascertaining one's domicile. These are, that every person has a domicile somewhere ; and no person can have more than one domicile at the same time, for one and the same purpose. It follows, from these maxims, that a man retains his domicile of origin till he changes it, by acquiring another ; and so each successive domicile continues, until changed by acquiring another. And it is equally obvious, that the acquisition of a new domicile does, at the same instant, terminate the preceding one.

In applying these rules to the proposed question, we take it for granted that it was intended to apply to a case where the student has his domicile of origin at a place other than the town where the institution is situated. In that case, we are of opinion that his going to a public institution, and residing there solely for the purpose of education, would not, of itself, give him a right to vote there, because it would not necessarily change his domicile ; but in such case, his right to vote at that place would depend upon all the circumstances connected with such residence. If he has a father living ; if he still remains a member of his father's family ; if he returns to pass his vacations ; if he is maintained and supported by his father ; these are strong circumstances, repelling the presumption of a change of domicile. So, if he have no father living ; if he have a dwellinghouse of his own, or real estate, of which he retains the occupation ; if he have a mother or other connexions, with whom he has before been accustomed to reside, and to whose family he returns in vacations ; if he describes himself of such place, and otherwise manifests his intent to continue his domicile there ; these are all circumstances tending to prove that his domicile is not changed.

But if, having a father or mother, they should remove to the town where the college is situated, and he should still remain a member of the family of the parent ; or if, having no parent, or being separated from his father's family, not being maintained

or supported by him ; or, if he has a family of his own, and removes with them to such town ; or by purchase or lease takes up his permanent abode there, without intending to return to his former domicil ; if he depend on his own property, income or industry for his support ;—these are circumstances, more or less conclusive, to show a change of domicil, and the acquisition of a domicil in the town where the college is situated. In general, it may be said that an intent to change one's domicil and place of abode is not so readily presumed from a residence at a public institution for the purposes of education, for a given length of time, as it would be from a like removal from one town to another, and residing there for the ordinary purposes of life ; and therefore stronger facts and circumstances must concur to establish the proof of change of domicil, in the one case than in the other. But where the proofs of change of domicil, drawn from the various sources already indicated, are such as to overcome the presumption of the continuance of the prior domicil, such preponderance of proof, concurring with an actual residence of the student in the town where the public institution is situated, will be sufficient to establish his domicil, and give him a right to vote in that town, with other municipal rights and privileges. And as liability to taxation for personal property depends on domicil, he will also be subject to taxation for his poll and general personal property, and to all other municipal duties in the same town.

For the information of the Honorable House, we respectfully refer to several decided cases, bearing upon this subject : *Amherst v. Granby*, 7 Mass. 1. *Putnam v. Johnson*, 10 Mass. 488. *Harvard College v. Gore*, 5 Pick. 370. *Lyman v. Fiske*, 17 Pick. 231. *Abington v. North Bridgewater*, 23 Pick. 170.

The question submitted supposes the case of a person residing at a public institution for the purpose of education, "who has his means of support from another place, either within or without this Commonwealth."

We do not consider this circumstance of much importance in determining the domicil. If, indeed, a young man, over twenty-one years of age, is still supported by his father or mother, it

is a circumstance concurring with other proofs to show that he is still a member of the family of such parent, and so may bear on the question of domicil. But if he is emancipated from his father's family, and independent in his means of support, it is immaterial from what place his means of support are derived. If it be income from rents of real estate leased in another town, or dividends from the stock of a bank there situated, or interest of money invested on mortgage in such town, it seems to us that this circumstance would have no influence in deciding the question of domicil, and the consequent right to vote in any town.

LEMUEL SHAW,
S. S. WILDE,
CHARLES A. DEWEY,
SAMUEL HUBBARD

Boston, March 15, 1843.

Persons who have the requisite qualification as to residence, but who have been exempted from taxation, on account of their poverty, two successive years before their arrival at the age of seventy years, are not entitled to vote for governor, lieutenant governor, senators and representatives, under the third article of the amendments to the constitution.

To the Honorable the House of Representatives of the Commonwealth of Massachusetts :

The undersigned, justices of the supreme judicial court, have received the order of the Honorable House, passed on the second of March, eighteen hundred and forty-four, requesting their opinion upon the following question :

“Is a person who has the requisite qualifications as to residence, but who has been exempted from taxation, on account of his poverty, two successive years before his arrival at the age of seventy years, entitled to vote in the election of governor, lieutenant governor, senators and representatives, after his arrival at that age ? ”

In answer to this question, we cheerfully submit the following opinion :

A just answer to the question must depend upon a true construction of the third article of the amendments to the constitution of the Commonwealth, and the laws, to which that article refers, in order to determine the qualifications of voters. This article extends the right of voting, in the elections mentioned, to every male citizen of twenty-one years of age and upwards, excepting paupers and persons under guardianship, having certain qualifications of residence, and who shall have paid by himself, or his parent, master or guardian, any state or county tax assessed upon him within two years preceding, in any town or district of the Commonwealth; and also to every person, who, being otherwise qualified, shall be by law exempted from taxation. This provision of the constitution, being irrepealable by any act of ordinary legislation, must be obeyed and carried into effect according to its plain intent and meaning, as far as that can be ascertained. One of these requisites, to qualify the citizen to vote, is, that he shall have paid some state or county tax assessed upon him within the state, within two years preceding the election, or be by law exempted from taxation. In requiring the payment of a tax, the constitution makes no distinction between a poll tax and a tax on the person in respect to his real or personal estate.

The question supposes the case of a person who, for two years before arriving at the age of seventy years, has been wholly exempted from taxation, on account of his poverty. It follows, that until he shall be taxed for property, he cannot have paid any tax assessed on him within two years previous to the election at which he may claim a right to vote, and cannot therefore establish his right upon that branch of the provision. The only question therefore is, whether he is a person exempted by law from taxation, within the other clause in this article of the constitution.

In reference to this question, we ask leave to refer to an opinion, given by the justices of the supreme judicial court, in February, eighteen hundred and thirty-two, signed by two of the subscribers, and in which the undersigned all concur. This opinion will be found in 11 Pickering's Reports, 538, and we think it goes far towards deciding the present case. The opin

on then expressed was, that persons exempted under the discretionary authority of the assessors, as persons who by reason of age, infirmity or poverty, are unable to contribute towards the public charges, are not persons exempted by law from taxation, within the meaning of this clause in the constitution. We then considered, and still consider, for the reasons there stated more at length, that the constitution had reference to a class of persons acting in capacities beneficial to the community, such as ministers of the gospel, instructors in public seminaries, and the like persons, to whom such exemption had been granted by law, as one mode of making up their compensation for services. And although this class of persons, exempted by law, has been diminished by succeeding legislation, it does not alter the meaning of the constitution in this respect. Looking therefore to the probable purpose and intent of the makers of the constitution, and the terms in which they have expressed their intent, we are of opinion, that the persons who are annually and temporarily exempted by the assessors from taxation, by reason of their poverty and inability to contribute to the public revenue, are not persons exempted by law from taxation, who are entitled to vote without payment of any tax.

These considerations apply to all persons of whatever age, who are by the discretionary power of the assessors excused from taxation, on account of infirmity or poverty. But the specific question is, whether persons of seventy years of age and over, who have paid no tax assessed on them within two years before, because they have been exempted on account of age, infirmity or poverty, can exercise the right of voting. No difference in this respect exists between persons of seventy years old and upwards, and those under that age, except that by the law as it now stands, persons of seventy and upwards are not liable to be taxed for their polls. In this respect some change has been made in the law, since the opinion was expressed in eighteen hundred and thirty-two. Before that time, the subject was usually regulated by the annual tax act, and the specific provision therein referred to was contained in the then last tax act, St. 1831, c. 151, by which all male citizens of sixteen years old and upwards were liable to a poll tax. In

one other particular, the law has undergone a slight change of form. As the law formerly stood, the provision, that if there were any persons, who by reason of age, infirmity or poverty, might be unable to contribute towards the public charges, in the judgment of the assessors, they might exempt the polls and estates of such persons, or abate any part of what they were assessed, was usually embraced in the tax act; but now by the revised statutes, c. 7, § 5, 8th clause, the provision is made part of the permanent law regulating taxation. The reason probably is, that formerly it was usual to have a state tax annually, in which these clauses were introduced, and the general law in respect to town and county taxes directed that assessors should conform to the then last state tax act, in assessing county and town taxes. But in eighteen hundred and thirty-five, when the revised statutes were prepared, a state tax had become more unfrequent, and it became therefore convenient that the general provisions, in regard to town and county taxes, should be embraced in the body of the laws, to be made complete, and furnished to the officers and people of the Commonwealth, instead of referring to tax acts, which might be passed, if at all, at long intervals only. But the power thus humanely given to assessors to exempt individual persons, unable by reason of poverty to contribute to the public charges, was of precisely the same nature and extent then as now, and the law was similar in effect, and substantially so in terms; and we think therefore that this exemption is still a temporary indulgence and excuse from the payment of taxes, allowed at the discretion of assessors, and that the persons thus excused are not persons exempted by law from taxation.

And we are also of opinion, that the modification of the law, determining what persons shall be liable to a poll tax, can make no difference in respect to the right of voting. Formerly, all persons of sixteen years old and upwards, were taxable for their polls. By the revised statutes, it was reduced and limited to persons from sixteen to seventy years old, and by the statute of 1843, c. 87, it was again reduced to persons from twenty to seventy.

But whilst persons of all ages are liable generally to taxation

for property, those over seventy cannot be said to be exempted by law from taxation, merely because they are no longer liable for a poll tax. It is the liability to taxation, not the want of taxable property, which distinguishes citizens generally from citizens exempted by law from taxation. The exemption by law, contemplated by the constitution, is an exemption from all taxation, without any distinction between a poll tax and any other tax. Persons over seventy, therefore, although not liable to a poll tax, because the law does not make their polls taxable, are still liable in common with others to all other taxes ; and if not actually taxed in any one year, it is because they happen to have no taxable property. Such want of taxable property may be temporary or casual, and such persons may at any time acquire property, by inheritance or otherwise, and would then be taxable, and so they are not exempted by law from taxation. Upon any other construction, if the legislature were still further to limit the number of persons liable to a poll tax, and if all such persons, not happening to have taxable property, and so not being assessed in fact for any tax, should be permitted to vote, it would, in our opinion, be repugnant to the constitution, which requires either the actual payment of a tax, or that the person shall be of some class having a general exemption by law from taxation. Suppose the legislature should, for some good reason, enact that persons between thirty and seventy, and no others, should be taxed for polls ; there would be a class of persons between twenty-one and thirty, who would be entitled by age and residence to vote, and in regard to whom it could not be pretended that they were exempted by law from taxation. Their right to vote, then, by the plain and express terms of the constitution, would depend upon the payment of some tax, and there being no poll tax, it must of course be the payment of a tax on property. So, if the legislature were to take off the poll tax altogether, it could not be said that all persons having, at any particular time, no taxable property, would be exempted by law from taxation ; therefore, to come within the other provision of the constitution, they must actually pay a tax, to enable them to vote ; and such, in the absence of all poll taxes, must be a property tax. We are, therefore, of

opinion, that persons over seventy years of age, are no more entitled, on that account, than any other persons, to vote, without the actual payment of a tax, although on account of the change of the law they are not liable to a poll tax. And it makes no difference that such persons have, during the two years before arriving at seventy, or before or after that time, been exempted by the discretionary power of the assessors, on account of poverty, from being assessed or charged with the payment of any tax. All such persons may acquire property, by inheritance or otherwise, and being always liable by law to taxation, may, in respect to such acquired property, be actually taxed. But as the constitution expressly requires, that, in order to be qualified to vote, a person must actually have paid a tax, or be exempted by law from taxation, we are of opinion that persons seventy years old, though not liable to be taxed for their polls, are not thereby exempted by law from taxation, and therefore they are not entitled to vote without the actual payment of some other tax.

LEMUEL SHAW,
S. S. WILDE,
CHARLES A. DEWEY,
SAMUEL HUBBARD.

Boston, March 9, 1844.

By St. 1838, c. 9, § 3, the annual payment which the Western Rail Road Corporation is required to make, from its income, to the sinking fund, is to be made from its net income; that is, from the amount of money remaining to the corporation, on making up its annual account, after deducting from all its receipts the necessary expense of repairs and management, and also the amount of interest on the debt of the Commonwealth, which the corporation are bound to pay in behalf of the Commonwealth: And if such net income, in any year, is not sufficient for such payment, the corporation cannot be required to make up the deficiency from the income of succeeding years.

To the Honorable the House of Representatives of the Commonwealth of Massachusetts :

The undersigned, justices of the supreme judicial court, have received a copy of the order of the Honorable House, request-

ing them to give their opinion on the following questions, in relation to the obligations imposed on the Western Rail Road Corporation, by the third section of the act passed on the 21st of February, 1838, entitled "an act to aid the construction of the Western Rail Road," viz. :

" 1st. Is the contribution of one per cent., which is to be paid to the sinking fund from the income of said corporation, payable from its gross or its net income ?

" 2d. If the said contribution is payable from the net income of the corporation, and if, in any one year, the said net income should be insufficient for that purpose, can the corporation be required, in any event, to make up the deficiency from the income of succeeding years ? "

As the questions, on the face of them, seem to involve a controverted question of right between the Commonwealth and a private corporation, a question apparently and peculiarly fit to be decided in a regular course of judicial proceeding, we had doubts, at the first view of the subject, whether it was a case coming within the intent of the constitution, pursuant to which questions of law are to be proposed ; and whether it might not be expedient first to submit to the consideration of the Honorable House, whether it would be expedient to request an *ex parte* opinion in such a case. Our doubt was this : As we have no means, in such case, of summoning the parties adversely interested before us, or of inquiring, in a judicial course of proceeding, into the facts upon which the controverted right depends, nor of hearing counsel to set forth and vindicate their respective views of the law, such an opinion, without notice to the parties, would be contrary to the plain dictates of justice, if such an opinion could be considered as having the force of a judgment, binding on the rights of parties. But as we understand that the session of the legislature is drawing to a close, and it might be inconvenient to the House to refer the matter back to them before acting upon it ; and as an opinion upon an abstract question, without any investigation of facts, and without argument, must be taken as an opinion upon the precise question proposed, which cannot affect the rights of parties, should they hereafter be brought before the court in a regular course of judi-

cial proceeding, we have thought it best, without further delay, to submit an opinion upon the questions proposed. We, therefore, ask leave to submit the following opinion of the subscribers, three of the justices of the supreme judicial court. One of our number, Mr. Justice Wilde, having a small interest in the stock of the Western Rail Road Corporation, asks leave, on that account, to decline the expression of any opinion on the subject.

The first question is, whether the contribution of one per cent., which is to be paid to the sinking fund from the income of the Western Rail Road Corporation, is payable from its gross or its net income ?

This is proposed by the Honorable House as a question in relation to the obligations imposed on the Western Rail Road Corporation, by the third section of the act passed on the 21st of February, 1838, entitled an act to aid the construction of the Western Rail Road. St. 1838, c. 9, § 3.

We suppose the whole obligation of the corporation depends upon the provision referred to ; and although there are some subsequent acts, making further loans of the Commonwealth's certificates of debt, of which, in like manner, the corporation are required to pay the interest annually, we have not specially referred to them, but confined ourselves to the obligation imposed by the provision specified in the question.

We are not quite certain that we understand precisely what is intended by the "gross income" of the corporation, and what by the "net income." But we suppose that in any mode of estimating the income of the corporation, the expenses of necessary repairs, and also of maintaining and employing engines and cars, for the carriage of passengers and freight, and all other necessary and incidental expenses of management, must be deducted from the actual receipts. Such balance only can justly be regarded as the income of the corporation.

In looking into the other parts of the act in question, we find it is provided, that the corporation, on receiving the certificates to be loaned to them, shall enter into an obligation, secured by a mortgage upon their whole property, stipulating, amongst other things, that they will pay the semi-annual interest upon

the Commonwealth's certificates of debt, and indemnify the Commonwealth from all such payments.

It is not to be presumed that it is contemplated by this act, that the corporation were to pay into the treasury of the Commonwealth a sum to be loaned and invested as a sinking fund, until the necessary duty — a duty due alike to the government and the holders of their securities — had first been performed, of paying the interest on those securities. But their whole stock and property being mortgaged to the Commonwealth, the only fund, out of which the corporation could pay the regularly accruing interest on the government securities, was the income from the use of the road. By force of the obligations which the corporation were bound to take on themselves, we are of opinion that the income of the road was specially pledged to the Commonwealth, and through them to the holders of their certificates of debt, to secure the payment of the semi-annual interest thereon, before paying any thing into the treasury by way of sinking fund. It would have been manifestly worse than useless to require the corporation to pay a sum of money into the treasury, if it should thereby render them unable to pay the interest on the securities borrowed of the Commonwealth, by means of which the Commonwealth would be immediately liable for the same payment. We think, therefore, that the payment of such interest was a charge on the income, prior in its nature to any payment towards the sinking fund, and that the latter payment was to be made out of an income, diminished by the payment of such interest. And so, if subsequent loans of scrip were made to the corporation by the Commonwealth, under the like obligation, imposed on and assumed by the corporation, of paying the interest annually or semi-annually, the payment of such interest would be a prior charge upon the fund, arising from the annual income of the road. By "net income," therefore, we understand the amount of money remaining to the corporation, on making up their annual account, after deducting from all receipts for passage and freight, and other revenue, if any, the necessary expenses of repairs and management, and also the amount of annual or semi-annual interest on the debt of the Commonwealth, which the corporation are required by their ob-

ligation to the Commonwealth to pay in their behalf. Understanding the term "net income" in this sense, we are of opinion, that the contribution of one per cent. towards the sinking fund, to be paid by the corporation to the treasurer, is to be paid out of their net, and not out of their gross income.

But the question may arise, — suppose the annual income, thus charged, should be insufficient to pay the contribution to the sinking fund, what is the consequence? We are of opinion that the corporation, in that event, are discharged from their obligation of paying it, in whole or in part, as the fund may wholly or partially fail. It is a well settled rule of law, that an obligation to pay money out of a specified accruing fund is conditional; and if the expected fund does not arise, the obligation to pay becomes void. So, if an expected accruing fund is charged with the payment of several sums, in a certain order of priority, if the whole is absorbed in the payment of prior charges, the claims of subsequent parties must fail. The provision of the statute is, that after the said road shall be opened for use, a sum equal to one per cent. on the amount of scrip thus loaned, shall be annually set apart from the income of said road, and paid to said treasurer. If there be no such income, no such sum can be set apart, and the obligation to pay it, of course, does not arise.

In answer to the second question, we are of opinion, that if the net income of the corporation, in any one year, shall be insufficient to make the said contribution of one per cent. to the sinking fund, the corporation cannot be required to make up the deficiency from the income of succeeding years.

Strictly speaking, there can be no deficiency, for the making up of which the corporation are responsible. Their duty is to set apart from the net annual income of each year a sum of money, and to pay the same thus set apart. But if there be no income in any one year, from which it can be set apart, no duty arises, no debt is created, chargeable on the income of succeeding years. The whole duty of the corporation is performed.

But there is another consideration, leading to the same conclusion. The whole provision for a sinking fund, to be derived from the income of the road, is to take effect only when the

road shall be opened for use. It supposes the case when the road has begun to accomplish the purpose for which it was established, and to yield a revenue, as well as to reimburse the loans made to raise the means for its construction, and to yield an income to stockholders, who have advanced their private capital for the same purpose. We think, therefore, the true policy and purpose of the provision was this ; that when the revenue from the road should be more than sufficient to pay the interest chargeable upon the loans made for its construction, then the one per cent. for the sinking fund should be set apart, and the balance, if any, paid in dividends to the stockholders ; and that the accounts of each year were to be settled and closed by the appropriation and distribution of the proceeds of such year.

In any point of view, therefore, in which we can consider the question, we are of opinion, that the contribution of one per cent., each and every year, to the sinking fund, is to be paid out of the net amount of the income of that year, if it be sufficient for the purpose, and not otherwise ; and that if the net income be insufficient, in any one year, to pay the contribution of that year, it does not constitute a deficiency chargeable upon the income of succeeding years.

LEMUEL SHAW,
CHARLES A. DEWEY,
SAMUEL HUBBARD

Boston, March 13, 1844.

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ABANDONMENT.

See ACTION, 4. 8. PRESCRIPTION.

ABATEMENT.

See JUDGMENT, 2.

ACTION.

1. Three creditors, on different days, attached their debtor's right of redeeming mortgaged real estate; A., the second attaching creditor, first recovered judgment, and sold the equity of redemption to B. on his execution: The debtor afterwards released his interest in the mortgaged estate to B.: B. released the same to A., who released it to P.: The first attaching creditor subsequently recovered judgment, and caused the equity to be sold on execution, and the proceeds of the sale exceeded the amount of his judgment and the officer's fees: The third attaching creditor afterwards recovered judgment, and put his execution into the hands of the officer who held the surplus proceeds of said sale, and he applied those proceeds towards satisfaction of that execution. P. claimed those proceeds, and brought an action against the officer for misapplying them. *Held*, that the proceeds were rightfully applied by the officer, and that P. had no cause of action against him. *Pease v. Bancroft*, 90.
2. When an officer seizes goods on a search warrant, which correspond with and come within the description of those for which he is commanded, by the warrant, to search, he is not liable to an action, though the goods so seized by him may not be the same which were lost by the complainant. *Stone v. Dana*, 98.
3. An officer is liable to an action for neglecting to return an execution according to the precept thereof, although the judgment creditor suffers no injury by such neglect. *Goodnow v. Willard*, 517.
4. An action at common law lies for damages caused by flowing land by a dam that has been connected with a mill, if the defendant has abandoned the intention of again using the dam and water as a mill power; and the jury may decide whether he has abandoned such intention.

Hodges v. Hodges, 205.

5. A. bound himself by bond, "in the full and just sum of \$500, liquidated damages," to convey to B. on demand 3000 feet of land in a city, on the corner of L. and M. streets, including a certain house and shed, and afterwards, on B.'s demand, executed a deed to him, conveying a lot of land, described by metes and bounds, at the corner of said streets, with the buildings thereon standing: B. accepted the deed, and he and A. agreed, that if it was not right, it should be made right: It was afterwards found, upon a survey of the land thus conveyed, that it did not include the shed mentioned in the bond, and that it contained only 2513 feet. *Held*, in an action by B. on the bond, that he had not waived his claim for a conveyance of 3000 feet, and that he was entitled to maintain his action without making another demand for a deed.

Shute v. Taylor, 61

6. An action may be maintained against selectmen for refusing to receive the vote of a qualified voter, or for omitting to put his name on the list of voters, without proof of malice. The St. of 1822, c. 104, and Rev Sts. c. 3, made no change in the law on this point.

Blanchard v. Stearns, 296.

7. But, in order to maintain such action, it must be shown that the plaintiff furnished the defendants with sufficient evidence of his having the legal qualifications of a voter, and requested them to insert his name on the list of voters, before the defendants refused to receive his vote, or omitted to insert his name on such list. *Id.*
8. A voter, who is challenged at the polls, cannot maintain an action against selectmen for refusing to receive his vote, if they do not act wilfully or maliciously, but under a mistake into which they are led by his conduct, which was likely to mislead them into a belief that he had abandoned his claim to a right to vote. *Humphrey v. Kingman*, 162.

See AWARD, 2. COVENANT, 2. JUDGMENT, 1. PROMISSORY NOTE, 7.

ADMINISTRATOR.

See MORTGAGE, 1.

ADVANCEMENT,

See SET-OFF.

AGREEMENT.

See CONTRACT. TOWN.

AMENDMENT.

1. Where several tenants in common of land join as demandants in a writ of entry, and one of them dies pending the suit, and his share of the land descends to another demandant, the latter may amend the writ so as to claim therein his enlarged share of the demanded premises.

Hancock v. Wentworth, 446.

2. Where several plaintiffs unite in a bill praying for an injunction, and only part of them show a title to relief, the court is authorized by the

Rev. Sta. c. 100, § 22, to allow an amendment of the bill, by striking out part of the plaintiffs, even after issue joined and evidence published.

Dana v. Valentine, 8.

9. But, where a landlord brings a bill in equity to suppress a nuisance caused to his property before he demised it, and continued afterwards, it seems that he cannot be permitted to amend the bill, by joining the tenant, after a hearing on the merits, and after the expiration of the tenant's term.

Ingraham v. Dunnell, 118.

APPEAL.

See JUDGMENT, 2.

ASSIGNEES OF INSOLVENT DEBTORS.

See INSOLVENT DEBTORS. PARTNERSHIP, 2.

ASSIGNMENT.

See MORTGAGE, 1. PAYMENT, 2.

ASSUMPSIT.

1. An action of assumpsit may be maintained in this State, upon an instrument made in another State, and which by the law of that State is a specialty, if by the law of this State it is a simple contract.

M^c Cless v. Burt, 198.

2. Where a parish tax is illegally assessed upon a party and is collected by distress and sale of his property, he may maintain an action for money had and received, against the parish, for the amount of the tax, but not for the costs of the distress. *Dow v. First Parish in Sudbury*, 73.

3. Where one tenant in common of a vessel, who has authority to insure for his cotenant, effects insurance in his own name, for whom it may concern, and, after a loss, makes an adjustment with the underwriters, by receiving the amount of his own loss only, "in full of all losses on the policy;" though he may be liable to the cotenant, in an action on the case, for the full amount of his loss, yet the cotenant may waive his right thus to recover the full amount of his loss, may adopt the adjustment made with the underwriters, and recover of the other tenant in common, in an action for money had and received, his share of the money received by such tenant: Or he may set off his share of the money so received, in an action *ex contractu* brought against him by the other tenant in common. *Briggs v. Call*, 504.

4. A. purchased of B. a cargo of yellow and white corn on board B.'s schooner, the quantity not being known, and agreed to pay one sum per bushel for the yellow, and another sum per bushel for the white; B. warranting it to be of a certain quality: A. paid B. \$1200, "on account of corn per schooner:" The schooner was hauled to A.'s wharf, and he took therefrom and put into his warehouse a part of the corn, and then refused to receive any more, because the residue was not such as B. had warranted it to be, and immediately gave notice to B. that he would re-

ceive no more of the cargo, and requested B. to take the schooner away : The corn thus taken by A. amounted, at the agreed price per bushel, to \$ 1087 ; and A. sued B., in an action for money had and received, to recover back the difference between that sum and \$ 1200. *Held*, that the contract was entire, and that the action could not be maintained ; that A. might have rescinded the contract by returning all the corn, and then have maintained an action to recover back the money advanced ; or might have maintained an action on the warranty. *Clark v. Baker*, 452.

ATTACHMENT.

1. Where an equity of redemption is attached by different creditors, at different times, a sale thereof on execution by the second attaching creditor, before the first has recovered judgment, is void as against all the others, and the third attaching creditor thereby obtains the rights to which the second would otherwise have been entitled. And such was the law, even before the provisions of the Rev. Sts. c. 97, §§ 34, 35.

Pease v. Bancroft, 80.

2. Where a creditor attaches his debtor's property on mesne process, and seizes the same on execution, within thirty days after he recovers judgment, he has a lien or security on the property, which cannot be annulled, destroyed or impaired by his debtor being decreed a bankrupt, under the United States bankrupt act of 1841, on a petition filed after such seizure of the property, though before the time when, by law, it could be sold on execution. *Ames v. Wentworth*, 294.

3. A. conveyed land to B. merely for the purpose of enabling B. to convey the same to C., and B. conveyed the same to C. accordingly : Before the deeds from A. to B. and from B. to C. were recorded, D. attached the land as the property of B., and subsequently levied an execution thereon. *Held*, that B. had no attachable interest in the land, after he had conveyed it to C., and that D. could not hold the land against C.

Haynes v. Jones, 292.

4. Though standing corn and potatoes in the ground may be attached, if they are fit for harvest, yet a valid attachment can be made only by severing them from the freehold, and keeping them in the officer's custody

Heard v. Fairbanks, 111.

5. By Rev. Sts. c. 90, § 105, an attachment of mortgaged goods is dissolved by the death of the mortgagor before they are taken in execution, although his estate is insolvent. *Parsons v. Merrill*, 356.

See ACTION, 1. MORTGAGE, 3. OFFICER, 1. 2. TRUSTEE PROCESS.

ATTEMPT TO ESCAPE.

1. The provision in Rev. Sts. c. 143, § 51, for the punishment of prisoners who forcibly break prison, with intent to escape, or by force or violence attempt to escape therefrom, although no escape be effected, does not apply to prisoners who are held in custody for trial, or for not obtaining bail for their appearance, but only to convicts, who are sentenced to a term of imprisonment as a punishment, and are confined in pursuance of the sentence. *Commonwealth v. Homer*, 555.

- 8 Where a conditional sentence is awarded against a convict, under Rev. Sts. c. 139, by which he is ordered to pay a fine within a limited time, and in default of payment to be imprisoned, and he is committed to jail, to be detained until such sentence is complied with, he is imprisoned for a fixed term by way of punishment, within the true intent of Rev. Sts. c. 143, § 51, and if he forcibly breaks jail, with intent to escape, or by force or violence attempts to escape therefrom, before the time limited for the payment of the fine has elapsed, he is liable to punishment for such breach or attempt. *Commonwealth v. Briggs*, 559.

AUDITA QUERELA.

- A judgment debtor, who is arrested on execution, and voluntarily permitted by the officer to escape, and is afterwards arrested by the officer and committed to jail on the same execution, cannot maintain a writ of *audita querela* against the officer to recover damages for the false imprisonment.

Coffin v. Ever, 228.

AUDITOR.

1. Those matters of defence which go in bar of an action, or which are not matters of account, are not to be passed upon by an auditor; and, if done without consent of parties, should be stricken from his report, or the report should be recommitted or rejected. But where the evidence offered bears directly or incidentally on the matters of account, the auditor should examine it, and may state it, if he deem it necessary to render his report intelligible; and if both parties go into such evidence before him, his report will not be rejected merely for the reason that he states facts respecting matters which go in bar, and his conclusions from such facts.

Jones v. Stevens, 373.

2. During the trial of an action for work done, &c., in manufacturing cloth, the court, by consent of parties, appointed four men "to estimate the cost of manufacturing, &c., the pieces produced," who returned into court written estimates of such cost; and the case was afterwards sent to an auditor to state the accounts of the parties. *Held*, that said estimates were not in the nature of an award, and binding on the parties; and that the auditor might receive evidence to vary and control those estimates, and might state the accounts according to such evidence. *Id*

See EVIDENCE, 14. 15.

AUTHORITY.

See EXECUTOR, 2. 3.

AWARD.

- 1 Parties to an action of trespass *quare clausum fregit* submitted the determination of the action to referees, under a rule of court, with an agreement that they should "settle the division line between the *locus in quo* and the land of the defendant." The referees made their award, "that the division line between the estates of the parties be fixed and established" by certain boundaries specifically described in said award; and

this award was returned to the court, accepted and recorded. *Held*, that this record was conclusive on the parties, and that in a writ of entry afterwards brought by one of them against the other, to recover land on the demandant's side of the line thus established by the referees, the tenant could not be permitted to show that the referees erred in their judgment, and that the line established by them was not the true boundary line between him and the demandant. *Goodridge v. Dustin*, 363.

2. A. and B. submitted to arbitrators, by a rule under Rev. Sta. c. 114, § 2, a demand made by A. on B. for a certain sum "for injury said A. has sustained by reason of the flowing of his land by said B., by means of a dam maintained by him," and also all demands between the parties: The award of the arbitrators was, "each party shall pay one half of all the expenses arising from this rule, and they shall settle even all accounts and demands previous to the date" of the award: This award was accepted: A. afterwards brought an action against B. to recover damages caused by the same dam, and B. defended on the ground that the award was a bar to the action: *Held*, that the claim for damages, made by A. in the submission, was only for the flowing of his land up to the date of the submission, and not for gross damages, including future injury by the continuance of the dam; but that, as the award was accepted, it was a bar to A.'s claim for damages up to the date thereof, but was not a bar to his claim for damages afterwards sustained. *Hodges v. Hodges*, 205.
3. Where an award, made under the Rev. Sta. c. 114, is returned to the court of common pleas, although the original agreement of submission is not produced and filed, yet the court has jurisdiction of the award, and ought to take cognizance thereof, upon satisfactory evidence that an agreement of submission was signed, acknowledged and certified, conformably to the statute requisitions, and has been lost, and on proof of a copy thereof, or of its contents, so full and complete as to be substantially a copy. *Eaton v. Hall*, 287.

See EVIDENCE, 20. EXCEPTIONS, 2.

BAIL.

It is a good defence to a writ of *scire facias* against bail, that the principal, after they became his bail, was convicted of a crime, and is imprisoned on sentence. In such case, the bail need not bring the principal into court, on *habeas corpus*, to be surrendered, but they will be discharged on motion. *Way v. Wright*, 380.

BANK.

See LIEN.

BANKRUPT ACT OF 1841.

See ATTACHMENT, 2.

BILL IN EQUITY.

See AMENDMENT, 2. 3. EQUITY.

BILL OF EXCHANGE.

1. Where one indorsed a bill of exchange, for the accommodation of the drawer, who negotiated it on an agreement, not assented to nor known by the indorser, that it should not be presented to the drawee for acceptance, until maturity, and it was accordingly first presented to the drawee at maturity, and then dishonored; it was held that the indorser was not thereby discharged. *Fall River U. Bank v. Willard*, 216.
2. Where the holder of an indorsed bill of exchange, which is not accepted by the drawee, merely informs the drawee that he (the holder) has the bill, but does not actually present it to him for acceptance, and the drawee thereupon tells him that the bill will not be accepted nor paid, the indorser is not thereby discharged, though no notice is given to him of the drawee's declarations. *Ib.*
3. Where there are several successive indorsers of a bill of exchange or promissory note — whether the indorsements be upon actual negotiation for value, or for the purpose of collection only — the holder may send notice of its dishonor to his immediate indorser; and if that indorser, after receiving such notice, give seasonable notice to his immediate indorser, the latter is liable to his immediate indorsee, though he does not receive notice so soon as if it were transmitted to him by the holder, immediately upon the dishonor: And so of each successive indorser.

Eagle Bank v. Hathaway, 212.

4. A bill of exchange was made payable at Philadelphia to A., or order, who resided in Providence, and he indorsed it, for valuable consideration, after acceptance, to a bank in Providence: This bank indorsed and transmitted the bill to a bank in New York for collection; which bank also indorsed and transmitted it, for collection, to a bank in Philadelphia: The latter bank caused the bill to be presented to the acceptor for payment, at maturity, and, on payment being refused, caused written notices to be made out for all the parties to the bill, and seasonably sent those notices to the bank in New York; which bank seasonably sent notice of non-payment to the bank in Providence, and also enclosed to that bank the notice to A., the first indorser: The bank in Providence immediately placed this notice to A. in the post-office in that city. *Held*, that the notice to A. was seasonable and sufficient, and that he was liable to that bank on his indorsement. *Ib.*

See PROMISSORY NOTE, 4. 5.

BILL OF LADING.

See CONSIGNOR & CONSIGNEE.

BOUNDARY.

See DEED, 3. DISSEIZIN, 5. ESTOPPEL. EVIDENCE, 19.

BUILDINGS.

Erected on land not owned by the builder. See DEED, 1. MORTGAGE, 2

BURDEN OF PROOF.

See EVIDENCE, 12—14.

COLLATERAL SECURITY.

See COVENANT, 2. LIEN.

COLLECTOR.

Where a collector appointed by commissioners under the Rev. Sts. c. 115, regulating "proceedings for improving meadows," &c., has a warrant from such commissioners, lawful on its face, directing him to collect assessments made by them on the proprietors of meadows, &c., and he seizes and sells the property of such proprietors, pursuant to his warrant, he is not liable to an action of trespass, although the proceedings previous to the issuing of the warrant were not such as authorized the commissioners to make the assessments. Such warrant is his sufficient justification. *Upton v. Holden*, 360.

See VOTER, 3.

COMMISSIONS.

See INSURANCE, 2.

COMMITTEE.

Of a town. See TOWN.

CONSIGNOR & CONSIGNEE.

A. of Brazil, being indebted to P., H. & Co. of New York, was requested by them to make a remittance in discharge of his debt, and he thereupon shipped goods on board a vessel bound to Salem, on his own account and risk, and sent therewith bills of lading, by which the goods were made deliverable to his own order, and which were indorsed by him in blank, and enclosed to H. & Co. of New York (successors of P., H. & Co.) with authority to fill up the blank and make the goods deliverable to themselves, or to such person as they might name, with power to receive the proceeds in satisfaction of A.'s debt to P., H. & Co.: On the arrival of the vessel at Salem, the bills of lading were forwarded to H. & Co., who filled up the indorsement thereon by making the goods deliverable to C., H. & Co. of Boston, who were to pay duties and freight, dispose of the goods, and account for the proceeds thereof in payment of A.'s said debt: C., H. & Co. thereupon went to Salem, received the goods and entered them at the custom-house, gave bond for the duties, and became responsible for the freight: While the goods were in their possession, the same were attached as the property of P., H. & Co.; whereupon C., H. & Co. brought an action of replevin against the attaching officer. *Held*, that the property in the goods had not vested in P., H. & Co., and that C., H. & Co. were entitled to maintain their action.

Chandler v. Sprague. 306.

CONSPIRACY.

It was alleged in a declaration, that the plaintiff and R. were partners, and that the defendant covenanted with them to furnish them with money to be used as capital in their partnership business; that the defendant did so furnish money, during a certain time, and afterwards, "maliciously intending and contriving to injure and ruin the plaintiff, and confederating and conspiring with said R. to injure and ruin the plaintiff in his business, and to break up said partnership, &c., refused any longer to furnish capital, according to his covenant, and brought a suit against said partners to recover the money furnished to them by him, and recovered judgment against them, took out execution, and caused their stock in trade to be sold on said execution, at a great sacrifice, to pay the same;" and that said R., in pursuance of said confederacy, had refused to join with the plaintiff in a suit against the defendant, for a breach of said covenant. *Held*, that the plaintiff, in order to maintain his action, must prove not only that the defendant had broken his covenant, but that he did so with the intent, and pursuant to the confederacy, as set forth in the declaration.

Talbot v. Cains, 590.

CONSTITUTIONAL LAW.

See FUGITIVES FROM JUSTICE. MUNICIPAL COURT. VOTER, 4. 5.

CONSTRUCTION.

See CONTRACT.

CONTRACT.

Consideration of. See PROMISSORY NOTE, 1.

By committee of a town. See TOWN.

Against the policy of the law. See EXECUTOR, 3.

Construction.

1. A. shipped on board B.'s vessel for a fishing voyage, and signed a shipping paper in which it was agreed that A. should have a certain proportion of the fish that he should take on the voyage, or the proceeds thereof, and that B. should render to A. an account of the delivery or sales of all such fish: Before the vessel sailed on the voyage, A. drew an order on B. requesting him to pay to C., or order, a certain sum, at the end of the voyage, if he (A.) should make enough to pay said sum; which order B. accepted. In a suit against B. on this acceptance, it was *held*, that by "the end of the voyage" was not meant the arrival of the vessel, but the sale of the fish. *Bradford v. Drew*, 188.
2. In a deed *inter partes*, viz. by and between A., B. and C. on the one part, and D., E. and F. on the other part—after a recital that said D., E. and F. were a committee to purchase a steamboat to run, &c., for an association of subscribers, and that it was probable that they (said D., E. and F.) might find it necessary, in pursuance of said object, to contract debts beyond the amount subscribed therefor—it was agreed by A., B. and C., that if the contracts of D., E. and F. for said object should ex-

ceed the amount subscribed therefor, then they (A., B. and C.) would bear and pay to D., E. and F. one half of the amount that their said contracts for said objects should exceed the amount subscribed therefor. *Held*, that this was a joint contract of A., B. and C. *Held also*, that the joint liability of A., B. and C. was not annulled by a subsequent clause in the deed, by which it was mutually agreed, that the advances contemplated to be made by D., E. and F. should be paid equally, and that all profits and losses arising from such advances should be paid or borne equally, by all the parties to said deed. *Bartlett v. Robbins*, 184.

3. The mayor and aldermen of the city of Boston passed an order, "that a reward of \$500 be offered to any person who shall give information so that any person shall be convicted of setting fire to any building, for the purpose of burning the same:" An advertisement was inserted in the city newspapers which were published on the next morning after said order was passed, reciting that sundry houses and other buildings had been recently set on fire, and offering a reward of \$500 to any person "who shall give information so that any perpetrator of these outrages shall be convicted." This advertisement purported to be "by order of the mayor and aldermen," and was signed by the city clerk. *Held*, that the advertisement must be taken to be the official act of the mayor and aldermen. *Held also*, that the order and the advertisement were to be construed together, as parts of the same transaction, and that by the true construction thereof, the reward was offered for information that would lead to the conviction of offences previously committed, and not offences thereafter committed. *Freeman v. City of Boston*, 56.

See ASSUMPSIT, 4. COVENANT, 2. INSURANCE, 1.

CORONER.

See SHERIFF.

CORPORATION.

See TRUST AND TRUSTEE.

COSTS.

Where an action for obstructing a stream below the plaintiff's mill, or for obstructing by a mill-dam the natural ebb of the tide over the plaintiff's salt meadow above such dam, is commenced in the court of common pleas, and sustained by that court, after objection taken by the defendant to its jurisdiction, and a verdict is returned for the plaintiff, and the defendant thereupon brings the case into the supreme judicial court by exceptions, where it is dismissed because the court below had no jurisdiction thereof, the defendant is entitled to costs.

Cary v. Daniels, 236. *Turner v. Blodgett*, 240, n.

See ASSUMPSIT, 2. DAMAGES, 1.

COURT OF COMMON PLEAS.

See MUNICIPAL COURT.

COVENANT.

1. Where land, which is conveyed by deed, is described as land "through which the water from a mill passes," and the grantor inserts a covenant in the deed, that the granted premises are free from all incumbrances, the existence of a right in the mill owner to cleanse the natural channel of the stream and remove obstructions to the free flow of the water from the mill, is not an incumbrance, within the meaning of such covenant.

Prescott v. Williams, 429.

2. Where a debtor deposits notes with his creditor, as collateral security, to be collected and accounted for, or to be returned within a specified time, and the creditor thereupon covenants or promises not to sue the debtor until the securities shall be given up; such covenant or promise is not a bar to a suit by the creditor, though brought before he has given up the securities. *Foster v. Purdy*, 442.

See CONSPIRACY.

CUSTOM.

See EVIDENCE, 17.

DAMAGES.

1. In an action for the breach of a warranty that the signature of an indorser on a note transferred to the plaintiff by the defendant was genuine, the plaintiff is entitled to recover, as part of his damages, the costs incurred by him in an unsuccessful suit against the supposed indorser, if the plaintiff commenced such suit in good faith, not knowing that such signature was forged, and gave the warrantor seasonable notice of the pendency of the suit, and requested him to furnish evidence of the genuineness of the signature. *Cookidge v. Brigham*, 68.
2. A. engaged by bond, "in the full and just sum of \$500, liquidated damages," to convey to B. 3000 feet of land, and afterwards, on B.'s demand, executed a deed to him, conveying a lot of land, described by metes and bounds: B. accepted the deed, and he and A. agreed that if it was not right, it should be made right: It was afterwards found, upon a survey of the land thus conveyed, that it contained only 2513 feet. *Held*, in a suit by B. on the bond, that as he had accepted said deed in part performance of the bond, the sum of \$500 was not to be regarded as liquidated damages, but that he was entitled to recover only the actual damages which he had sustained. *Shute v. Taylor*, 61.
3. Though a jury, on the trial of an action for the continuance of a nuisance, give damages for a little longer time than they ought, yet a new trial will not be ordered, for this cause, if the plaintiff remit such part of the damages as is thus wrongly assessed by the jury.

Hodges v. Hodges, 205

See AWARD, 2. NUISANCE. RAIL ROAD, 2.

DECLARATION.

See PLEADING.

DEED.

- 1 In a suit between B. and K., to try the title to land which was extended in execution by K., as the property of D., and which D. was alleged to have acquired by disseizing B., it was held that a deed, made by D. to B., without fraud or duress, and with a knowledge of its purport and effect, in which D. conveyed to B. the buildings which D. had erected on the land, describing them as standing on the land of B., was conclusive evidence that D. recognized B.'s title to the land, and his own interest in the buildings as personal property; and that such deed should take effect against K., although it was executed after he attached the land as the property of D. *Brown v. King*, 173.
- 2 Where the heirs of K. gave deeds to C. of land which they described as "the estate on which C. now lives," or "the estate called the C. farm," and "being the same which was conveyed by M. to K. by deed" bearing a certain date, and it was shown that C., as lessee of K., and otherwise, had previously occupied the whole farm for many years; it was held that the deeds passed the right and title of the heirs to the whole farm, although the deed from M. to K., which was therein referred to, did not include the whole.

Melvin v. Proprietors of Locks and Canals, 15.

- 3 A deed conveying a wharf which extends from the upland below high water mark, and bounding on an arm of the sea in which the tide ebbs and flows, passes the flats as parcel and also as appurtenant to the wharf.

Ashby v. Eastern Rail Road Company, 368.

See ATTACHMENT, 3. COVENANT, 1. DAMAGES, 2. DISSEIZIN, 1.

DEMAND.

See ACTION, 5. PROMISSORY NOTE, 7.

DEMURRER.

See EQUITY, 11.

DEPOSITION.

- 1 Depositions in perpetual remembrance, taken before an indictment is found, are not admissible on the trial of the indictment.

Commonwealth v. Ricketson, 412.

- 2 Where two magistrates, who took a deposition within the Commonwealth in perpetual remembrance, stated, in their certificate annexed thereto, that "the deponent, being sworn to testify the truth, the whole truth, and nothing but the truth, in the case in hearing before us, made oath to the truth of the foregoing deposition by him made and subscribed," and that the parties interested had due notice and appeared with their counsel; it was held that the deposition was admissible in evidence; especially when objected to by the counsel who were present when it was taken. *Brown v. King*, 173.

See EVIDENCE, 9.

DEVISE.

See WILL.

DISSEIZIN.

1. Where parties agree, though by parol only, upon a divisional line between their adjoining lands, and afterwards hold possession conformably to such line, the possession of one is adverse to the claim of the other and amounts to a disseizin ; so that a deed by one, purporting to convey the land thus in possession of the other, passes nothing to the grantee.

Boston and Worcester Rail Road Corporation v. Sparhawk, 489.

2. If one agrees to buy and another to sell land, and no consideration is paid, nor deed given, and the buyer enters into possession, the fair inference is, that the entry and possession are not adverse and a disseizin, but by consent of the owner and in subordination to his title, until payment is made and a deed given, and constitute a tenancy at will. But if, on such agreement, the consideration is paid and the owner consents that the buyer may enter and hold the land as his own, and the delay in giving a deed is by accident or mistake, or because a deed cannot be immediately procured, and the owner agrees to give a deed, without further consideration or condition, and the buyer thereupon enters into possession ; such entry and possession are not to be deemed subordinate to the title of the owner, but as adverse and a disseizin. *Brown v. King*, 173.
3. The St. of 32 Hen. 8, c. 33, which is a part of the common law of this State, and which provided that no descent to the heir of a disseizor, who had not had peaceable possession for the space of five years next after the disseizin, should toll the entry of him who has right to the land, extends not only to disseizins by actual expulsion, but also to all disseizins whereby, on the death of the disseizor, a descent is cast on the heir.

Tolman v. Sparhawk, 489.

4. Where several persons in succession enter on land as disseizors, their several possessions cannot be tacked so as to make a continuity of disseizin of sufficient length to bar the owner's right of entry, unless there is a privity of estate, or their several titles are connected ; but where the first disseizor demises the land, and the lessee takes and keeps possession till the lessor's death, and afterwards remains in possession as tenant, either at will or at sufferance, of the disseizee, there is such a connexion of title as preserves the continuity of the disseizin.

Melvin v. Proprietors of Locks and Canals, 15.

5. Notorious and exclusive possession, without right, constitutes a disseizin : So does an entry under a void grant : Therefore, where a demandant in a real action admits that there has been adverse possession for thirty years, he cannot set up the objection that the first entry upon him was by mistake as to the boundaries described in a deed, and for that reason not a disseizin. *Id.*

See ESTOPPEL, 1. EVIDENCE, 12. WILL, 8.

DIVORCE.

Where parties, who are residents of another State, are married there and reside there after marriage, and the husband there deserts the wife, and she afterwards removes into this State, and resides here five years, the desertion being continued during that time, she is not entitled to a divorce under *St.* 1838, c. 126, although she and her husband lived together in this State a part of the time between the marriage and the desertion. The court has no jurisdiction of such a case. *Brett v. Brett*, 233.

See HUSBAND AND WIFE, 4.

DOMICIL.

See PROMISSORY NOTE, 4. 5. VOTER, 4.

DOWER.

Where a testator devised specific parts of his real estate to his wife, in fee, and bequeathed to her all his personal property, and ordered that the other part of his real estate should be disposed of as the law directs, and the wife accepted the devise and bequest made to her; it was held that she was not entitled to dower in the other part of the real estate.

Adams v. Adams, 277.

See PARTNERSHIP

EASEMENT.

1. The owner of a water mill has an easement in the land below, for the free passage of the water from the mill, in the natural channel of the stream, accompanied with a right to enter upon the land for the purpose of clearing out the stream and removing obstructions to the free flow of the water. *Prescott v. Williams*, 429.
2. An easement in land of a right of passage way to certain buildings is extinguished by the laying out and construction of a highway over the site of such buildings. *Hancock v. Wentworth*, 446.
3. It is no objection to a recovery in a real action, that a highway has been laid out over the demanded premises or a part thereof; nor that the tenant has an easement in the demanded premises. *Ib.*
4. An action by a mill owner for an obstruction of the stream below his mill and close, whereby the water was prevented from passing off from the wheel of his mill along said stream, in the usual course, and as of right it ought to pass, is an action respecting an easement on real estate, within the meaning of *St.* 1840, c. 87, § 1, and original and exclusive jurisdiction thereof belongs to the supreme judicial court.

Cary v. Daniels, 236.

5. So of an action by an owner of salt meadow, situate above a mill-dam on a navigable stream, against the owner of such dam, for obstructing the natural ebb of the tide, and thereby injuring the grass on such meadow. *Turner v. Blodgett*, 240, n.

EQUITY.

1. The court has no jurisdiction in equity in cases of mere mistake.

Gould v. Gould, 274.

2. A. died intestate, leaving B., a son, and C., a daughter, his only lawful heirs, and D., an elder illegitimate son, who had always been recognized by A. as a lawful child, and had lived in A.'s family during his minority, and whose illegitimacy was not known nor suspected by the lawful heirs, nor shown to have been known by himself: D. claimed one third of A.'s real estate, and gave to B. a quitclaim deed of all his interest in the estate; for which B. gave him a promissory note: After D.'s death, B. took up the note, and gave one payable to D.'s widow, who was his executrix and residuary legatee, and afterwards paid that note, in part, by transferring to the widow a note of J. which was payable to B.: J. afterwards took up that note and gave one to the widow, payable to herself: B. subsequently discovered the illegitimacy of D., and filed a bill in equity against the widow of D., praying for a decree that the widow had no right in the last mentioned note, and that J. should pay the amount thereof to B., and that the widow should give up the note to be cancelled. *Held*, that all the transactions set forth in the bill were founded on mistake; that no trust arose therefrom in favor of B., of which cognizance could be taken under the Rev. Sts. c. 81; and that the bill must be dismissed for want of jurisdiction of the matter thereof. *Ib.*
3. The authority given to the court, by the Rev. Sts. c. 81, § 8, and c. 105, § 14, to hear and determine in equity all suits and matters concerning waste, where there is not an adequate remedy at law, extends to cases of technical waste only, and not to those trespasses which courts, that have full chancery powers, restrain by injunction.

Attaquin v. Fish, 140

4. The authority given to the court, by the Rev. Sts. c. 81, § 8, to hear and determine in equity "all cases in which there are more than two parties having distinct interests, which cannot be justly and definitively decided and adjusted in one action at the common law," does not apply to a case where one is charged with a trespass upon land, and the question is, whether the land, if he has no title to it, is owned by certain individuals, as tenants in common, or by a municipal corporation. *Ib.*
5. A landlord cannot maintain a bill in equity to suppress a nuisance caused to his property before he demised it, and continued afterwards, without joining his tenant as a co-plaintiff. *Ingraham v. Dunnell*, 118.
6. A party is not entitled to an injunction to restrain an injury caused to his reversionary interest in an estate by a nuisance, unless such injury will probably be irreparable, or cannot be compensated by damages recovered in a suit at law. *Ib.*
7. Where a bill in equity is brought, praying for an injunction to suppress a private nuisance, and it is doubtful, on the evidence, whether the defendant has not a good defence by prescription or estoppel, the court will not order a perpetual injunction, until the plaintiff has established his right to redress by a trial at law. In such case, if there is no valid objection to the bill, and there is danger of irreparable mischief, the court will direct an issue to be tried at law, and will order a temporary injunction to restrain the defendant in the mean time. *Ib.*

8. An owner of vacant land, which is intended for house lots, is not entitled to an injunction to restrain the exercise of an offensive trade in the vicinity thereof, whereby its value is diminished. Such owner has a complete and adequate remedy at law for the injury so caused.

Dana v. Valentine, 8.

9. Though a party is entitled, upon a bill in equity, to an injunction to restrain the exercise of an offensive trade so near to his dwellinghouse as to be a nuisance to him, yet if it be doubtful, on the evidence, whether he who causes the nuisance has not a prescriptive right to exercise the trade there, the court will not issue such injunction, until the party complaining has established his right to redress in a suit at law. And the court, in such case, will not suspend the proceedings on the bill, until a trial of the right at law, and issue a temporary injunction, to restrain the defendant in the mean time, unless there is danger of irreparable damage to the plaintiff. *Ib.*

10. A. made a negotiable note to B., payable on demand, under an agreement that it should be placed in the hands of C. to be by him delivered to B. or returned to A., on certain conditions: B. fraudulently obtained possession of the note, and negotiated it six months after its date, and the indorsee brought a suit thereon against A., who thereupon filed a bill in equity, praying for an injunction and relief. *Held*, that the court had no jurisdiction in equity, and that A. had an adequate and complete remedy at law. *Pool v. Lloyd*, 525.

11. When a bill in equity seeks special and general relief, and also a discovery, and relief is the principal object, and discovery is sought merely as incidental to the relief, if the plaintiff shows no title to the relief sought, a demurrer lies to the whole bill. *Ib.*

See EXECUTOR, 3.

ERROR.

1. When a defendant is found guilty, generally, on an indictment which charges him, in one count, with entering a dwellinghouse in the nighttime of a certain day, with intent to commit a larceny, and, in another count, with a larceny on the same day in the same dwellinghouse, and he is sentenced to a greater punishment than is warranted by law, either for such entry or for mere larceny in a dwellinghouse; the court cannot, on a writ of error, presume that one and the same offence only is charged in the indictment. *Carlton v. Commonwealth*, 532.

2. So when a defendant is found guilty, generally, on an indictment which charges him with adultery, on three different days, with a woman of one name, and on a different day, with a woman of another name, and he is sentenced to a greater punishment than is warranted by law for a single act of adultery; the court cannot, on a writ of error, presume that a single offence only was charged in the indictment.

Booth v. Commonwealth, 535

See EXCEPTIONS 2. JUDGMENT, 2—4. WRIT, 3

ESCAPE.

See ATTEMPT TO ESCAPE. AUDITA QUERELA.

ESTOPPEL.

1. A tenant in a real action is not estopped to set up a title by disseizin, on reason of his having relied, as one ground of his title, upon a deed which was found not to convey the demanded premises.

Melvin v. Proprietors of Locks and Canals, 15.

2. Where owners of adjoining lands, intending to establish the divisional line according to the true boundary, agree, by parol, on a line that does not conform to such boundary, and afterwards hold possession according to such conventional line, such agreement, so made by mistake, and the possession under it, do not estop the party, who has suffered by the mistake, from asserting his title to the land that lies between the true boundary line and such conventional line, and recovering the same in a real action seasonably brought; especially if the tenant in such action has not made improvements on the demanded premises of greater value than the land without the improvements, and for which he is not entitled to recover of the demandant. *Tolman v. Sparhawk*, 469.

3. A. and B., owners of adjoining land, intending to establish the divisional line according to the true boundary, agreed, by parol, on a line that did not conform to such boundary, and afterwards held possession according to such conventional line: B. sold his land to C.: Before the sale, A. stated to C. that the land which he (A.) claimed was bounded by said conventional line between him and B., and that he did not claim beyond that line: After the sale to C., he made improvements on the land next to such conventional line, with the knowledge of A., who was often present and pointed out said line, without expressing any dissent to C.'s proceedings, or giving notice that he had any claim to said land: A afterwards discovered that said conventional line was not the true dividing line, and that C. was in possession, as B. had been, of a piece of land which, according to the true line, belonged to him (A.), and he therefore brought a writ of entry against C. to recover the land between the true line and said conventional line. *Held*, that A. was not estopped to claim this land of C., as A. had acted under a mere mistake, without fraud or gross negligence.

Brewer v. Boston and Worcester Rail Road Corporation, 478.

See AWARD, 1.

EVIDENCE.

1. On the trial of A. for suborning B. to commit perjury on a former trial of A. for another offence, a witness testified that B., on that former trial, swore that he came from L., as a witness on that trial, in consequence of a letter written to him by A. *Held*, that although this was not evidence that A. wrote such letter to B., yet it was evidence that B. so testified in the presence of A., and as A. thereby had an opportunity to prove, but did not prove, on the trial for suborning B., in what manner, or by

whose agency B. came from L., such testimony of B. might be considered by the jury, in connexion with the other evidence in the case.

Commonwealth v. Douglass, 241.

2. An averment, in an indictment for a riotous assault upon an officer in the lawful discharge of the duties of his office, that he was in the service of a legal precept, and had A. in his custody as a prisoner, to be examined on a charge of larceny, is supported by proof that the officer was in the service of a legal precept, and had A. in his custody as a prisoner, to be examined on a charge of larceny in another State, and of being a fugitive from justice. *Commonwealth v. Tracy*, 536.
3. On the trial of an indictment for a riotous assault upon an officer while serving a legal precept on A., who was charged with larceny in another State, and with being a fugitive from justice, the defendants cannot introduce evidence that B., who claimed the custody of A. as a fugitive slave, had declared, and that the officer knew B. had declared, that A. had not committed larceny, and that the charge was made merely for the purpose of getting A. into custody, so that he might the more easily be carried home. *Ib.*
4. A Boston pilot offered his services to S., the master of a vessel bound into Boston harbor, and S. did not accept them: The pilot subsequently claimed pilotage fees of S., and they both went before a commissioner of pilotage and submitted the claim to his decision: S. stated to the commissioner that he was a stranger, &c., and that when he approached the harbor he had a pilot on board whom he had paid: R. was afterwards indicted and tried for undertaking to pilot S.'s vessel into the harbor; and on the trial, the statement made by S. to the commissioner was offered in evidence against R. *Held*, that it was inadmissible.

Commonwealth v. Ricketson, 412.

5. When a jury, after a cause is committed to them and they have gone out, return and make an inquiry of the court, as to a fact, it is within the discretionary power of the court to admit testimony respecting the matter of such inquiry. *Ib.*
6. In an action against an officer, who had attached real estate before the passing of St. 1838, c. 186, for omitting to deposit in the clerk's office a copy of the writ, &c., within three days, whereby the attachment was lost, the mere fact, that he deposited such copy, &c., in the clerk's office, on the sixth day after the attachment, is not evidence that he promised the attaching creditor to do it within three days.

Goodnow v. Willard, 517.

7. Where one, who has been arrested on a search warrant, and carried before a magistrate and discharged, brings an action of trespass against the officer, who justifies under the warrant, he may, for the purpose of showing that the officer was not justified by the warrant, give evidence that the goods seized on the warrant did not come within the description of those for which the officer was directed to search: But he cannot, for such purpose, give evidence that the goods so seized were not those which were in the mind of the complainant, when he made the complaint and obtained the warrant. *Stone v. Dana*, 98.

8. Where one State court is abolished, and its jurisdiction is transferred to another court, the clerk and presiding judge of the latter court are competent to authenticate the records of the former in the manner prescribed by the act of congress of May 26th 1790, so as to make them admissible in evidence in the courts of another State. And where such clerk puts his attestation to a transcript of a judgment of the former court in another State, and annexes thereto the seal of the latter court, and the presiding judge of that court annexes thereto his certificate that such attestation is in due form, and that the former court is abolished, and its jurisdiction, records and proceedings transferred to the latter court — such certificate is *prima facie* evidence of the correctness and sufficiency of the attestation of such clerk, and makes the record, so authenticated, admissible in evidence in this State, under the Rev. Sta. c. 94, § 57.

Capen v. Emery, 436.

- 9 In the trial of an action by a mortgagee against a town clerk for not recording a mortgage of personal property, so that the property was attached and sold on execution by the mortgagor's other creditors, the plaintiff introduced the deposition of the mortgagor, taken under a commission, in which he deposed that he delivered the mortgage to the defendant to be recorded, and paid him his fees, &c. The defendant had filed a cross interrogatory, asking the deponent when he was first informed that the mortgage was not recorded — what steps or measures he took relating to the same — whether he made any communication to the mortgagee respecting the mortgage not being recorded — and what directions he received from the mortgagee in consequence of such communication. A part of the deponent's answer was, that he informed the mortgagee that the property was lost through the carelessness of the defendant, and that there was no way to recover it from the attaching officer, as the mortgage was lost, and there was no copy of it; that he also told the mortgagee that he (the deponent) considered the defendant holden for the payment of it, or bound to make it good; that the mortgagee replied, that he did not wish to go to law; and that nothing more was then said or done about it. *Held*, that this part of the deponent's answer was admissible in evidence against the defendant. *Held also*, that the defendant was rightly permitted to give in evidence, for the purpose of discrediting the deponent, a letter written by him, a short time before the mortgaged property was sold on execution, to one of his creditors, who had attached it, saying that he should be in no haste to pay the debt, and would pay no cost, and threatening the creditor with trouble, if he should dare to sell the property on execution. *Perkins v. Adams*, 44.

10. Where a defendant is served with notice to produce his books on the trial, and he refuses so to do, his pass books, containing an account of his dealings with the plaintiff, in which the entries were made by two of his clerks, and were always open to his inspection, are admissible in evidence against him, on the testimony of one of the clerks that the entries, therein made by himself, were accurate, and on proof that the other clerk is not within the jurisdiction of the court.

Coolidge v. Brigham, 66

11. A plaintiff, who calls for the defendant's books at the trial, and upon their being produced, claims the benefit of entries made therein to his credit, thereby makes the books *prima facie* evidence only, and may therefore contest and disprove the charges therein made against him by the defendant. *Raymond v. Nye*, 151.
12. If the seizin of a party, at a given time, is proved or admitted, the legal presumption is that such seizin continues, and the burden of proof is on him who alleges a disseizin; and that burden remains on him, even after he has given *prima facie* evidence of a disseizin.
Brown v. King, 173.
13. Where the proprietor of a wharf, which is bounded on an arm of the sea, claims the flats to the channel, viz. to low water mark, the burden of proof is on him to show that there was an original natural channel, from which the sea did not ebb at low water, and that such channel, or low water mark, was so far below his wharf as to include the flats which he claims. *Ashby v. Eastern Rail Road Co.*, 368.
14. The report of an auditor, appointed under the Rev. Sts. c. 96, § 25, to state the accounts of parties to an action, is *prima facie* evidence on the trial of the action by a jury, and changes the burden of proof.
Jones v. Stevens, 373.
15. When, on the trial of a cause, a party offers in evidence an auditor's report, which contains statements respecting a matter upon which he had no authority to pass, it is within the discretion of the court, to reject the whole report, or to recommit it, or to receive in evidence those parts of it which are admissible, and reject the other part. *Ib.*
16. Where A., who was taxed for land, denied, when called on for payment, that he was rightfully taxed, and directed the collector to call on B., the owner of the land, and the collector thereupon called on B.'s wife, in the absence of B., and she paid the tax, and A. afterwards repaid her, and took the receipt which the collector had given her; it was *held*, in an action by A. against selectmen for refusing his vote, on the ground that he had not paid the tax, that they might show that A. did not occupy the land for which he was taxed, as that fact had a bearing on the question whether the wife of B., in paying the tax, acted as A.'s agent, and whether she called on A. for repayment.
Humphrey v. Kingman, 102.
17. A. shipped on board B.'s vessel for a fishing voyage, and signed a shipping paper, in which it was agreed that A. should have a certain proportion of the fish that he should take on the voyage, or the proceeds thereof, and that B. should render to A. an account of the delivery or sales of all such fish: Before the vessel sailed on the voyage, A. drew an order on B., requesting him to pay to C., or order, a certain sum, at the end of the voyage, if he (A.) should make enough to pay said sum; which order B. accepted: In a suit against B. on this acceptance, it was *held*, that although it was proved that B. might have sold the fish, soon after the arrival of the vessel, for a sum sufficient to pay the order, and that, by delaying the sale, he did not obtain a sum sufficient for that purpose; yet, if he acted in good faith, and sold the fish within a reasonable time.

he was not liable to the holder of the order; and that, for the purpose of proving that he acted in good faith, and made the sale in a reasonable time, evidence was admissible of the custom of those employed in like fishing voyages, to delay the sale of fish as long as B. had delayed in this instance. *Bradford v. Drew*, 188.

- 18 Where, in the trial of an action between A. and B., it was made a question whether A. and C. were partners in the matter of the suit, and ought to have joined in bringing the action, letters written by C. to B., but not communicated to A., are not admissible in evidence.

Jones v. Stevens, 373.

- 19 The declaration of a person while he was in possession of land, claiming it as owner, that his line extended to a certain boundary which he pointed out when he made the declaration, is admissible in evidence, after his decease, on a trial of a question concerning the boundary line of the same tract of land. *Daggett v. Shaw*, 223.

20. Where an award was, "each party shall pay one half of the expenses arising from this rule, and they shall settle even all accounts and demands previous to the date" of the award, the testimony of the arbitrators is admissible, in a subsequent suit between the parties, to show that they allowed, in their award, certain damages that are claimed by the plaintiff in the subsequent suit, and set them off against the demands of the defendant. *Hodges v. Hodges*, 205.

See ACTION, 7. AWARD, 3. CONSPIRACY. DEED, 1. EXECUTOR, 1. OFFICER, 4. PLEADING, 3. PROMISSORY NOTE, 3. 8. SET-OFF. SUBORNATION, &c., 1. 2. PILOT, &c. 5. 7.

EXCEPTIONS.

1. A defendant, on being convicted of an offence, in the court of common pleas, at the March term thereof, alleged exceptions to the opinion of the court, and entered into a recognizance to enter and prosecute the same, not at the supreme judicial court "next to be held for the same county," as the law requires, and which was in April, but at the next November term of that court: The defendant not having entered his exceptions either at the April or November term, the Attorney General filed a complaint, setting forth the facts, and praying the court to order a *capias* to be issued and the defendant to be brought into court. The court held that they had jurisdiction of the cause, and ordered a *capias* to issue against the defendant. On his being brought in, his counsel declined to argue the exceptions, and the court awarded sentence against him on his conviction. *Commonwealth v. Dow*, 329.

2. Under the Rev. Sta. c. 82, § 12, exceptions may be alleged to the opinion, direction, or judgment of the court of common pleas upon an award made under c. 114 of the same statutes: The provision, in § 13 of the latter chapter, for a writ of error in such case, is merely cumulative.

Eaton v. Hall, 287.

See JUDGMENT, 2.

EXECUTION.

See ACTION, 1. ATTACHMENT, 1-3. MANUFACTURING CORPORATION.

EXECUTOR.

1. In a suit to recover a legacy of an executor, who is residuary legatee, and has given bond, pursuant to the Rev. Sts. c. 63, § 3, to pay all the debts and legacies of the testator, the plaintiff is not required to give any other proof, besides such bond, that the defendant has assets in his hands. And it seems, that such executor, who has given such bond, is bound to perform the condition of his bond, although he has not assets.

Jones v. Richardson, 247.

2. Where a testator, by his will, authorizes his executors to sell and convey his real estate which is not specifically devised, at such times as they shall think proper, and such sale is not required for the purpose of effecting any other provisions of the will, the executors have a mere naked power to sell, not coupled with a trust. *Shelton v. Homer*, 462.
3. Where a testator by his will gives a naked power to his executors, or such of them as shall take upon themselves the probate of his will, to sell and convey his real estate, and appoints two executors, who accept the trust and cause the will to be proved, and one of them afterwards resigns his trust, as executor, and is discharged therefrom by a decree of the probate court, the other executor has no authority, by the will, to sell and convey the testator's real estate: But if he has such authority, yet if he makes a contract for the sale of such estate to the executor who has resigned, he being one of the testator's heirs and devisees, and also, by the testator's will, trustee for other heirs and devisees, the court will not enforce specific performance of the contract, on a bill in equity; contracts, by which a trustee becomes the purchaser of the trust estate, being contrary to the policy of the law. *Id.*

See WILL, 7. WITNESS, 3.

EXTINGUISHMENT.

See EASEMENT, 2.

FISHING VOYAGE.

See CONTRACT, 1. EVIDENCE, 17.

FLATS.

See DEED, 3. EVIDENCE, 13. RAIL ROAD, 2.

FLOWING LANDS.

See MILLS. ACTION, 4.

FORCIBLE ENTRY AND DETAINER.

Where the relation of landlord and tenant does not exist, a party entitled to the possession of lands or tenements cannot maintain the summary process by complaint, provided by the Rev. Sts. c. 104, in cases of forcible entry and detainer, unless there has been an actual forcible entry or

detainer, by violence or threats of violence in taking or keeping possession, or some act or threat of force adapted to alarm the party, or deter him, from apprehension of forcible resistance. Such complaint is not sustained by proof of a mere unlawful entry into a house, after the owner has forbidden such entry, and a refusal to leave it, after repeated orders to leave it, without proof of the use of any violence or threats of violence, or any show of a determination forcibly to make the entry, or forcibly to resist the entry of the owner. *Saunders v. Robinson*, 343.

FRAUDULENT CONVEYANCE

See INSOLVENT DEBTORS.

FUGITIVES FROM JUSTICE.

The provision of the Rev. Sts. c. 142, § 8, for the apprehension of persons charged with the commission of offences in other States, is not repugnant to the constitution or laws of the United States.

Commonwealth v. Tracy, 536

See OFFICER, 3.

FUGITIVE SLAVES.

See OFFICER, 3.

HOUSE OF CORRECTION.

See PAUPERS, 2.

HUSBAND AND WIFE.

1. A married woman, whose land is delivered up on a writ of *habere facias* issued on a judgment against her husband, may make a formal entry on the land, (if her husband does not object,) for the purpose of preventing the statute bar of her right of entry.

Melvin v. Proprietors of Locks and Canals, 15.

2. By St. 1786, c. 13, a married woman was barred of her right of entry, unless she made entry within thirty years next after that right accrued.

Ib.

3. A husband subscribed for shares in the stock of a bank, and on paying the instalments, he stated that the shares were his wife's, and that she would have something to live upon, if he should spend all his property. He took receipts as for payments made by her, which payments were entered in the book of the bank, as made by the wife, and a certificate was issued to her as owner of the shares: The husband afterwards purchased shares in the same bank, in his own name, and sometimes pledged the same to the bank as security for loans made to him, but never so pledged, nor proposed so to pledge, the shares that stood in his wife's name: He received dividends as long as he lived, on the shares that stood in his own name and on those that stood in the name of his wife, and always requested the cashier of the bank to give him the money in two distinct and separate sums; and he sometimes asked for particular kinds of money for his wife, in payment of the dividends on the shares

that stood in her name. *Held*, on the husband's death, that the wife was entitled, as against his heirs at law, to hold the shares that stood in her name as her own property; there having been a gift thereof to her by her husband, valid as against all persons except his creditors, who might resort to the shares for payment of their debts, if he did not leave other property sufficient to pay them. *Adams v. Brackett*, 280.

4. Money deposited in a bank by a married woman who, with her husband's consent, lives separate from him, and is not supported by him, is his money, although it is deposited in her name, and he makes no attempt to obtain possession of it. His creditors may attach it by the trustee process, and they will hold it, although the wife obtain a decree of divorce from bed and board for a cause that existed before such process was served. *Ames v. Chew*, 320.

INCUMBRANCE.

See COVENANT, 1.

INDICTMENT.

1. Two or more distinct offences may be included in one indictment, in several counts, where the offences are of the same general nature, and where the mode of trial and the nature of the punishment are also the same.

Carlton v. Commonwealth, 532. *Booth v. Commonwealth*, 535.

2. Where one is licensed as a "taverner," under Rev. Sts. c. 47, § 21, to sell fermented liquor only, he cannot be convicted of selling spiritous liquor, on an indictment which alleges that he sold it "without being duly licensed as an innholder." In such case, the indictment should allege that the defendant, being licensed as an innholder, with authority to sell fermented liquor only, did sell spiritous liquor.

Commonwealth v. Thayer, 246.

3. An indictment under the Rev. Sts. c. 47, § 3, is good, which alleges that the defendant, on, &c., at, &c., without any legal authority or license, "did presume to be and was a retailer of spiritous liquors in less quantity than twenty-eight gallons, and that delivered and carried away all at one time, and did then and there sell and retail two quarts of spiritous liquors to" a person named. *Goodhue v. Commonwealth*, 553.

See ERROR.

INFANT.

See LIMITATIONS, 3.

INJUNCTION.

See EQUITY, 6-9.

INSANE PERSONS.

See PAUPERS, 2.

INSOLVENT DEBTORS.

An assignee of an insolvent debtor, under St. 1838, c. 163, may affirm a sale of goods made by such debtor for the purpose of delaying or defrauding his creditors, and receive the price of the goods from the vendee. And if such assignee, knowing all the facts of the case, brings an action against the vendee, on a note given by him for the price of the goods, and secures the demand by an attachment of his property, he thereby so far affirms the sale, and waives his right to disaffirm it, that he cannot, by discontinuing such action and demanding the goods, entitle himself to maintain an action of trover against the vendee, on his refusal to return them. *Butler v. Hildreth*, 49.

See PARTNERSHIP, 2.

INSOLVENT ESTATES.

See ATTACHMENT, 5.

INSURANCE.

1. A policy of insurance on goods to be shipped between two certain days does not cover goods shipped on either of those days.

Atkins v. Boylston F. & M. Ins. Co., 439.

2. A commission merchant, to whom the cargo of a vessel is consigned for sale, has an insurable interest in his expected commissions, and may insure the same while the vessel is on her voyage.

Putnam v. Mercantile Marine Ins. Co., 386.

3. Where a part owner of a vessel effects insurance for himself and the other owners, without their previous authority, they may ratify his act after they obtain knowledge of the loss of the vessel: And the bringing of an action on the policy, in their names, is a sufficient ratification of his act. *Finney v. Fairhaven Ins. Co.*, 192.

See ASSUMPSIT, 3.

JOINDER OF PARTIES.

See EQUITY, 5. PLEADING, 1.

JOINT CONTRACT.

See CONTRACT, 2. LIMITATIONS, &c., 2.

JUDGMENT.

1. A judgment against a claimant, which is a bar to another suit on the claim, is also a bar to the use by him of the same claim by way of set-off.

Jones v. Richardson, 247.

2. By St. 1840, c. 87, the judgment of the court of common pleas upon a plea in abatement is not the subject of appeal, writ of error, or exceptions, but is final in that court. *Browning v. Bancroft*, 88.

3. When a judgment in a criminal case is entire, and a writ of error is brought to reverse it, though it is erroneous in part only, it must be wholly reversed. *Christian v. Commonwealth*, 530.

4. The court, after reversing a judgment in a criminal case, cannot enter such judgment as the court below ought to have entered, nor remit the case to the court below for a new judgment. And this rule applies to a case where a sentence has been awarded, to take effect after the expiration of a former sentence, and the prisoner brings a writ of error to a hearing before the expiration of the former sentence. *Id.*

See EVIDENCE, 8. SENTENCE.

JURISDICTION.

See DIVORCE. EASEMENT, 4. 5. EQUITY, 1-3. 10. EXCEPTIONS, 1.

JURY.

It is to be presumed that jurors understand the instructions of the court in matters of law; and where proper instructions are given to them, a new trial will not be granted on the suggestion that they did not rightly understand the instructions. *Raymond v. Nye*, 151.

LANDLORD AND TENANT.

See EQUITY, 5. FORCIBLE ENTRY AND DETAINER.

LEGACY.

See EXECUTOR, 1. SET-OFF.

LEX LOCI.

See ASSUMPSIT, 1.

LIEN.

Where a negotiable note is indorsed to a bank by the payee, as collateral security for one only of several demands on which he is liable, the bank has no lien on such note as security for any other demand against the indorser: And in a suit on such indorsed note, brought by the bank against the maker, after the demand which it was pledged to secure has been paid, the maker, acting under the authority of the indorser, may successfully defend against the right of the bank to recover.

Neponset Bank v. Leland, 259.

See ATTACHMENT, 2. PARTNERSHIP, 1.

LIMITATIONS, STATUTE OF.

1. The provision in the Rev. Sts. c. 120, § 9, that the time of a party's absence and residence out of the State shall not be taken as any part of the time limited for the commencement of an action against him, does not apply to a case in which the action was barred by the statute of limitations that was in force before the revised statutes went into operation.

Wright v. Oakley, 400.

2. The provision in the Rev. Sts. c. 120, § 18 — that one of two or more joint contractors shall not lose the benefit of the statute of limitations by reason of part payment made by any of the other contractors — extends to contracts and payments made before those statutes were passed.

Peirce v. Tobey, 169.

8 Where a minor makes a payment on a joint note given by him and an adult, and after he comes of age makes an oral promise to pay the balance, he thereby so ratifies his former payment, that it will take the note out of the operation of the statute of limitations, as to himself, but not as to the adult. *Ib.*

See HUSBAND AND WIFE, 2. MIDDLESEX CANAL.

MANUFACTURING CORPORATION.

Under *Sts.* 1808, c. 65, § 6, and 1817, c. 183, an execution against a manufacturing corporation cannot be levied on the property of its members, unless there has first been a demand on the president, treasurer or clerk of the corporation, by the officer who holds the execution, to show to him property sufficient to satisfy and pay the sum due thereon; although, on the original writ, property of the members was attached, after a default of the corporation to show to the officer, who held the writ, property sufficient to satisfy the judgment which might be recovered thereon.

Stone v. Wiggin, 316.

MAYOR AND ALDERMEN.

See CONTRACT, 3.

MIDDLESEX CANAL.

Under the *St.* of 1793, c. 21, incorporating the Proprietors of the Middlesex Canal, which provided that any person who should be damaged by said Proprietors, by their flowing his land, should have compensation therefor by application to a court within one year from the time of the damage done, it was *held*, that the damage was done to the land owner, when said Proprietors' permanent dam across Concord River was completed, for the purpose of raising a head of water for the supply of their canal, and that he had no remedy by application to a court after a year from that time had elapsed.

Heard v. Proprietors of Middlesex Canal, 81.

MILLS.

Where a mill owner has acquired a prescriptive right to keep up a dam constantly, which, in its usual operation, would raise the water to a certain height, although from the leaky condition of the dam, or the rude construction of the machinery in his mill, or the lavish use of the stream, the water has not been usually and constantly kept up to such height, yet if he repair the dam, without so changing it as to raise the water higher than the old dam, when tight, would raise it, or if he use the water in a different manner, and thereby keep up the water more constantly than before; this is not a new use of the stream, for which a land owner can claim damages, but is a use conformable to the mill owner's prescriptive right. *Cowell v. Thayer*, 253.

See ACTION, 4.

MISTAKE.

See EQUITY, 1. 2. ESTOPPEL, 2. 3

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MONEY HAD AND RECEIVED.

See ASSUMPSIT, 3. 4.

MORTGAGE.

1. One who had mortgaged land, to secure a debt due on bond, was appointed administrator of the estate of the mortgagee, and returned an inventory of his intestate's property, including therein the debt due from himself on the bond: He afterwards settled his first administration account, in which he charged himself with the amount of the personal estate returned in the inventory; and his second account, in which he charged himself with the balance of the first: Thereupon the probate court passed a decree, ordering him to distribute the balance of the account, remaining in his hands, among the heirs of the intestate. *Held*, that by these proceedings, the debt due on the bond was paid; and that a subsequent assignment of the bond and mortgage, by the administrator, transferred to the assignee no interest in the land.

Ipswich Manuf. Co. v. Story, 310.

2. Where A., the owner of land, agrees to sell it to B., and to convey it to him by deed when B. shall erect a house thereon, and B. agrees to erect a house thereon, and that he will, on receiving a deed of the land, mortgage it to A. to secure the purchase money, B. does not, by erecting the house, acquire any property therein, but the same becomes a part of the realty; and a mortgage of the house by B., before he receives a deed of the land, conveys nothing to the mortgagee. *Milton v. Colby*, 78.
3. Where goods are mortgaged after they are attached, and the mortgagor dies before they are taken in execution, and his administrator receives the goods from the attaching officer, on paying him his fees and charges, (as required by Rev. Sts. c. 90, § 106,) the mortgagee is entitled to possession of the goods, as security for the mortgage debt, and may maintain an action for them against the administrator, after demand thereof, without paying or tendering to him the amount of fees and charges so paid by him. *Parsons v. Merrill*, 356.

See ATTACHMENT, 5. PARTITION, 1. PAYMENT.

MUNICIPAL COURT.

1. The St. of 1843, c. 7, which enacts that "all the duties, required by law to be performed by the judge of the municipal court, shall be performed by the justices of the court of common pleas, or by some one of them," is not repugnant to the constitution of the Commonwealth.

Brien v. Commonwealth, 508.

2. The office of judge of the municipal court was virtually abolished by the St. of 1843, c. 7, which transferred its duties to the court of common pleas *Id.*

NEW TRIAL.

See DAMAGES, 3. JURY.

NOTARY PUBLIC.

See PROMISSORY NOTE, 6.

NUISANCE.

1. plaintiff may recover damages for the *continuance* of a nuisance, *viz.* a dam across a stream that passes through his land, though his declaration alleges that the stream has long been obstructed by means of a dam erected by the defendant. *Hodges v. Hodges*, 205.

See DAMAGES, 3. EQUITY, 5-9.

OFFICER.

1. The Rev. Sts. c. 90, did not make it the duty of an officer, who attaches real estate, to deposit in the clerk's office the writ, or a copy thereof, with the return of the attachment. That duty was first imposed on such officer by St. 1838, c. 186. *Goodnow v. Willard*, 517.
2. After the revised statutes went into operation, and before the passing of St. 1838, c. 186, an officer was directed to "attach specially," without directions as to the property to be attached: He thereupon attached sufficient real estate; but the attachment was lost, in consequence of an omission to deposit a copy of the writ, &c., in the clerk's office, within three days. *Held*, that the officer had obeyed his directions, by attaching the real estate, and that he was not answerable to the creditor for the loss of the attachment, although there was sufficient personal property of the debtor, which might have been attached. *Ib.*
3. An officer who has a legal warrant to arrest A., who is charged with larceny in another State, and with being a fugitive from justice, does not abuse the process, nor forfeit his protection under such warrant, by holding at the same time a power of attorney from one who claims the custody of A. as a fugitive slave, and is proceeding to carry him before the proper tribunal, to obtain a certificate according to the law of the United States. *Commonwealth v. Tracy*, 536.
4. An officer returned on a warrant directing him to search the buildings of S. for certain described stolen goods, "By virtue of this warrant, having made diligent search and found three pieces of goods in the house of the within named S. and arrested the body of the within named S. and have him," &c. *Held*, that this return furnished *prima facie* evidence, at least, that the officer had found three pieces of the goods described, and that he was therefore justified in arresting S. and carrying him, with those goods, before a magistrate. *Stone v. Dana*, 98.

See ACTION, 1-3. AUDITA QUERELA. EVIDENCE, 2. 3. 6.

PARISH AND RELIGIOUS SOCIETY.

1. Where a person withdraws from a parish, in the manner provided by the Rev. Sts. c. 20, § 4, after the parish has granted a sum of money to defray its expenses, and before the expiration of the parochial year for which the money is granted, and a tax to raise the sum granted is not assessed until after the expiration of such year, and after a new valuation of estates is taken, and is then assessed on that valuation, such person cannot be legally included in such assessment.

Dow v. First Parish in Sudbury, 73.

2. Where persons, in the year 1824, formed themselves into an association for religious purposes, without any lay organization under St. 1823, c. 106, or otherwise, but solely under the advice and direction of the ministers and elders of their denomination, and entered into an agreement, which they afterwards fulfilled, to support and maintain public worship, it was *held*, that they constituted a religious society under St. 1811, c. 6, and became competent, as such, to take grants or donations, and to prosecute an action of trespass to maintain and defend the possession of real estate granted or leased to them for their use as a religious society. *Held* also, that the members of such society were competent witnesses for the plaintiffs in such action, within the intent of the Rev. Sts. c. 94, § 54.

Macomber v. Christian Society in Plymouth, 155.

See WITNESS, 4.

PARTITION.

1. A debtor made three mortgage deeds, at the same time, of the same land, to secure payment of different sums, on the same day, to three of his creditors: The deeds were recorded at the same time, and no preference or priority was intended by the parties: The mortgagor subsequently made partial payments, in different proportions, to each of the mortgagees; and after condition broken, he surrendered possession of the land to each of them, on the same day, who entered for foreclosure: One of the mortgagees thereupon filed a petition against the others for partition of the land. *Held*, that although the mortgagees were tenants in common in proportion to the amount of the balance of their several debts, yet that, until foreclosure, their estate in the land was not the subject of partition. *Ewer v. Holbs*, 1.
2. A., being owner of land, as tenant in common with B., in equal moieties, devised his moiety, in fractional parts, to four devisees: B. afterwards died intestate, and his moiety descended to his five heirs at law, four of whom were said devisees of A.: The moiety of the land that descended to B.'s heirs was divided, by process from the probate court, from the other moiety, and set off to them: One of A.'s devisees afterwards filed a petition for partition of the moiety devised, praying that his portion thereof might be set off to him in severalty. *Held*, that the petitioner was entitled to partition as prayed for, and was not bound to include in his petition the moiety which descended to the heirs of B.

Allen v. Hoyt, 394.

PARTNERSHIP.

1. When real estate is purchased by partners, with the partnership funds, for partnership use and convenience, although it is conveyed to them in such a manner as to make them tenants in common, yet in the absence of an express agreement, or of circumstances showing an intent that such estate shall be held for their separate use, it will be considered and treated, in equity, as vesting in them, in their partnership capacity,

clothed with an implied trust that they shall hold it, until the purposes, for which it was so purchased, shall be accomplished, and that it shall be applied, if necessary, to the payment of the partnership debts. Upon the dissolution of the partnership, by the death of one of the partners, the survivor has an equitable lien on such real estate for his indemnity against the debts of the firm, and for securing the balance that may be due to him from the deceased partner, on settlement of the partnership accounts between them; and the widow of such deceased partner has no right to dower in such real estate, nor have his heirs any beneficial interest therein, or in the rents received therefrom after his death, until the surviving partner is so indemnified.

Dyer v. Clark, 562. *Howard v. Priest*, 562.

2. Under St. 1838, c. 163, the assignees of an insolvent debtor, who is surviving partner of a firm, are entitled, as against the widow and heirs of the deceased partner, to all the real estate of the partners, which was purchased with the partnership funds, for the partnership business, and to the rents and profits thereof, to be applied towards payment of the debts of the firm. *Howard v. Priest*, 562.

See EVIDENCE, 18.

PAUPERS.

1. Under St. 1821, c. 94, § 2, and Rev. Sta. c. 45, § 1, which provide that a citizen, "having an estate of inheritance or freehold, in any town, and living on the same three years successively, shall gain a settlement in such town," he does not gain a settlement by thus living on an estate, which he has in remainder, as tenant of the owner of the preceding estate of freehold. The statutes refer to such an estate as the party has a right to occupy, and not to an estate in expectancy, where there is a preceding estate of freehold in another.

Inhabitants of Ipswich v. Inhabitants of Topsfield, 350.

2. Where an insane person, who is not able to pay for his own support, is confined in a house of correction, under St. 1836, c. 223, the town in which he has a settlement is liable for his support in such house, if he have no parent, master or kindred, liable by law to maintain him.

Watson v. Inhabitants of Charlestown, 54.

PAYMENT.

1. A debtor gave his creditor a mortgage of personal property to secure a balance of account: The dealing of the parties was afterwards continued, and the debtor, on being pressed for payment on account, told the creditor that he would endeavor to pay him for the articles he had received after the mortgage was given, and keep the subsequent accounts paid up; but that, as the creditor had security on the former part of the accounts, he must wait for payment of that part: The debtor afterwards made payments, from time to time, which were credited to him, generally, on the creditor's book, and which exceeded the amount that was due when the mortgage was given, but were less than the amount of the

articles afterwards furnished to him by the creditor : At the time when these payments were made, the creditor considered them as made towards payment of the articles furnished to the debtor subsequently to the mortgage: The creditor sold part of the mortgaged property, and took part thereof to his own use ; but the property, so taken by him, and the money received on the sale, were not sufficient to discharge the balance due to him when the mortgage was given. *Held*, that the payments made after the giving of the mortgage, though credited generally, on the creditor's book, might be applied by him towards payment of the subsequent accounts ; and that he was not chargeable in the process of foreign attachment, as trustee of the debtor, by reason of his retaining part of the mortgaged property, and the proceeds of the sale of the other part thereof. *Copen v. Alden*, 268.

- 2 A. and B. mortgaged their land to C. to secure a note made by A., payable to C. or his order : C. assigned the mortgage and note to D., but did not indorse the note ; and A. had notice of the assignment : D. brought an action on the note, in the name of C., against A., and B. afterwards paid the amount of the note to C. and took his receipt. *Held*, that this payment, though made by B. in good faith, and without actual notice of the assignment, could not avail A. as a defence, whether it was made at his request or without his request : and that D. was entitled to judgment, in C.'s name, on the note. *Merriam v. Bacon*, 95.

See EVIDENCE, 16. LIMITATIONS, &c., 2. 3. MORTGAGE, 1. SET-OFF VOTER, 1-3.

PEW.

Where a meetinghouse is conveyed to trustees for the use of a certain church and society, for a place of public religious worship for such church and society, and for no other use, intent or purpose whatsoever, and in the deeds of the pews in such house, which are given to an individual, the provisions of the conveyance of the house are referred to and recognized, the pew-owner has a right to the sole use of his pews on all occasions when the house is occupied, though it be opened for purposes different from those mentioned in the conveyance thereof ; and he has a right to exclude all others from his pews, on such occasions, by fastening the pew doors, or otherwise, in such manner as not to interrupt or annoy those who may occupy other pews ; and any person who enters such pews, knowing the facts, is a trespasser, and liable to an action by the owner. So if the owner of such pews cover them in an offensive manner, for the purpose of excluding others, and any person, in removing the offensive covering do any unnecessary injury to the pew or its fixtures, he is liable to the owner in an action of trespass. *Quere* as to the rights of pewholders, in meetinghouses generally, to the exclusive occupation of their pews when the house is opened for purposes not connected with public religious worship of the society which owns the house. *Jackson v. Rounseville*, 127.

See TRESPASS.

PILOT AND PILOTAGE.

1. By the 32d chapter of the revised statutes, every Boston pilot, who offers his services to the master of an inward bound vessel, before she has passed the line designated in § 24 of that chapter, is entitled to full fees of pilotage, whether his services are accepted or not.

Commonwealth v. Ricketson, 412.

2. Any master of a vessel may, in all cases, pilot his own vessel into Boston harbor, liable only to the payment of pilotage fees when a Boston pilot seasonably offers his services: But if no Boston pilot seasonably offers his services, the master may employ any other person to pilot his vessel in, and such person may do so, without incurring any penalty. *Ib.*
3. When a Boston pilot seasonably offers his services to the master of a vessel bound into Boston harbor, and the master of the vessel does not accept the services, but employs a person who is not authorized as a pilot for said harbor, to pilot his vessel in, the master thereby incurs no penalty; but such person, by undertaking to pilot the vessel in, incurs the penalty imposed by the Rev. Sts. c. 32, § 23. *Ib.*
4. The payment of pilotage fees by a master of a vessel, who has declined an authorized pilot's seasonable offer of service and employed an unauthorized person to pilot the vessel in, is not the payment of a penalty, and is no bar to an indictment against such person for undertaking to pilot such vessel in. *Ib.*
5. The pilots, who are authorized to pilot vessels through the Vineyard Sound, over Nantucket Shoals, have no authority, by the Rev. Sts. c. 32, § 42, to pilot the same vessels into Boston harbor: And when one of them undertakes to pilot one of such vessels into that harbor, at the request of the master thereof, and is indicted for so doing, his warrant, as such pilot, is not admissible in evidence, in his defence, even for the purpose of showing that he was lawfully on board such vessel. *Ib.*
6. Under the Rev. Sts. c. 32, § 24, it is a sufficient offer of a pilot's services, in the night, to the master of a vessel bound into Boston harbor, if the pilot approaches such vessel and hails her, and makes all the tender which the time and circumstances permit, and his hail is heard on board, though it is not answered: It is not necessary, in such case, that there should be an actual offer to the master, and that he should have actual knowledge of such offer. *Ib.*
7. When an authorized pilot seasonably offers his services to the master of a vessel bound into Boston harbor, and the master, without requiring the pilot to show his warrant, declines to accept his services, and employs an unauthorized person to pilot his vessel in, and such person is indicted for undertaking to pilot her in, he cannot defend on the ground that there is no proof that the pilot had his warrant with him when he offered his services. *Ib.*

See EVIDENCE. 4

PLEADING.

Parties to Suits.

1. A., the owner of a wharf, entered into a written agreement, not under seal, with B. and C., that certain machinery and fixtures should be erected on the wharf, at their common expense, and that the profits of the business to be carried on there should enure to their common benefit : A rail road was afterwards constructed across the flats below the wharf, and A., B. and C. joined in a petition for a jury to assess the damages thereby sustained by them, and alleged in their petition that they were the owners of the wharf, &c. *Held*, that if the jury believed, on all the evidence before them, that the petitioners had such an interest in the estate as entitled them to damages, and that they suffered damages jointly, then they properly joined in the petition, and were entitled to recover. *Ashby v. Eastern Rail Road Company*, 368.

See AMENDMENT, 2. 3. EQUITY, 5.

Declaration.

2. Where a suit is brought against the maker of a note which has been indorsed to a firm, and the plaintiff describes himself as surviving partner of the firm, it is not necessary (since the establishment of the rules of the court at March term, 1836) that the declaration should aver either a demand of payment and a refusal; or the name or death of the other member of the firm; or that the defendant did not pay the note to the firm, while it continued, nor to the plaintiff, after the firm was dissolved.

Knowles v. Byrnes, 115.

3. In an action against selectmen for refusing to receive the vote of a qualified voter, or for omitting to put his name on the list of voters, the declaration must aver, specifically, all the facts which constituted the plaintiff's qualifications to vote at the meeting at which his vote was refused, and that he, before offering his vote, furnished the defendants with sufficient evidence of his having those qualifications.

Blanchard v. Stearns, 298.

See CONSPIRACY. NUISANCE.

POOR DEBTORS.

Where two magistrates meet at the time and place appointed for the examination of a debtor committed on execution, and adjourn to a future day, and only one of them is able to attend again on that day, another magistrate may attend instead of him who is absent, and the two who are thus present may lawfully proceed to examine the debtor and administer to him the poor debtor's oath. *Brown v. Lakeman*, 347.

POWER.

See EXECUTOR, 2. 3.

PRESCRIPTION.

Where a party exercises an offensive trade in the same place for more than twenty years, with no molestation or interruption, except a suspension thereof for two years before the twenty years elapse, he does not, by such suspension, lose his right, unless it appears that he intended to abandon and not resume the exercise of such trade.

Dana v. Valentine, 8.

See EQUITY, 9. MILLS.

PRISON BREAKING.

See ATTEMPT TO ESCAPE.

PROMISSORY NOTE.

1. A note given by a judgment debtor to the assignee of the judgment, in part payment thereof, is on a sufficient consideration.

McClees v. Burt, 198.

2. Where the payee of a promissory note, which is in the hands of his attorney, indorses it *bonâ fide* to a third person, and leaves it in the attorney's hands for the use of the indorsee, the attorney thereby consents to hold it for the indorsee, and becomes his agent; and if the attorney bring an action on the note in the indorsee's name, which he sanctions, this is proof of actual transfer and constructive delivery of the note, though the indorsee never sees it. *Richardson v. Lincoln*, 201.
3. An indorsement of a note "without recourse," transfers the whole interest therein, and merely rebuts the indorser's liability to the indorsee and subsequent holders. But such indorsement, with other circumstances, may tend to show that the note was not indorsed for value, so as to prevent the promisor from making the same defence, in an action by the indorsee, which he might make in an action by the promisee. *Id.*
4. Where the indorser and holder of a note reside in the same place where the note is dishonored, notice of the dishonor must be given to the indorser personally, or at his domicile or place of business, and not through the post office. *Peirce v. Pendar*, 352.
5. P. went with his family to Bangor, in the autumn of 1835, and lived at board with his family, in different houses in that place, until the autumn of 1836: During this time, P. was often absent on business, and once took his family, for some weeks, to another place: He had a place of business in the counting room of W. & R., and no other place of business in Bangor; and his papers were left, during his absence, in the care of W., and were not taken away till the autumn of 1836: On the 26th of July 1836, a note, which was indorsed by P., fell due and was dishonored, at Bangor, by the maker's refusal to pay it; and it did not appear whether P. was or was not in Bangor on that day. Held, that P., on said 26th of July, had a domicile and place of business in Bangor, at one of which, if he was then absent, notice of the dishonor of the note should have been left. *Id.*
6. A note payable to P. or order, and indorsed by P. & R., was lodged in a bank in the city of B., where the maker and the indorsers had a domicile.

when the note fell due: The note was presented, by a notary public, to the maker for payment, which was refused; whereupon the notary made out a notice for P., directed to him at B., and put it into the post office at B: In a suit by the holder of the note against P. as indorser, the notary testified that he "was not able to find P. or any body who could tell him where he was; that he inquired of the cashier of the bank, and others, for P.'s residence, but was unable to learn from any one where he then resided:" He did not, however, make any inquiry of the maker or second indorser respecting P.'s residence. *Held*, that the notary had not used that reasonable diligence to ascertain P.'s residence, which would excuse the want of legal notice to him of the dishonor of the note. *Ib.*

7. An action may be maintained upon a note, against the maker, where the writ is made after sunset on the last day of grace, and is delivered to an officer on the next day, although there is no demand of payment before the writ is made. *Butler v. Kimball*, 94.
6. In a suit by A. on a note given to him in satisfaction of a judgment recovered against the promisor by B., the promisor cannot defend by showing that A., before said judgment was recovered, purchased of B. the demand which was the subject matter thereof, and afterwards, on the trial of the action, testified as a witness against the promisor.

McClees v. Burt, 198.

See BILL OF EXCHANGE. LIEN. PAYMENT, 2. PLEADING, 2.

RAIL ROAD.

1. By St. 1838, c. 9, § 3, the annual payment which the Western Rail Road Corporation is required to make, from its income, to the sinking fund, is to be made from its net income; that is, from the amount of money remaining to the corporation, on making up its annual account, after deducting from all its receipts the necessary expense of repairs and management, and also the amount of interest on the debt of the Commonwealth, which the corporation are bound to pay in behalf of the Commonwealth: And if such net income, in any year, is not sufficient for such payment, the corporation cannot be required to make up the deficiency from the income of succeeding years. *Opinion*, 596.
2. Where the value of a wharf is impaired by the construction of a rail road across the flats below it, the owner is entitled to recover of the proprietors of the rail road the damages thus sustained by him.

Ashby v. Eastern Rail Road Company, 368.

See PLEADING, 1.

RATIFICATION.

See ASSUMPSIT, 3. INSOLVENT DEBTORS. INSURANCE, 3. TOWN, 2. VOTER, 2.

REAL ACTION.

See EASEMENT, 3. HUSBAND AND WIFE, 2

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See DAMAGES, 3.

RESIDUARY LEGATEE.

See EXECUTOR, 1.

RETURN.

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REWARD, OFFER OF.

See CONTRACT, 3.

RIOT.

See EVIDENCE, 2. 3.

SALE.

Of cargo of corn. See ASSUMPSIT, 4.

On Writ. See TRUSTEE PROCESS.

SEARCH WARRANT.

The Rev. Sts. c. 142, § 3, which direct that search warrants shall command the officer, to whom they are directed, to bring before a magistrate stolen property, or other things, when found, "and the persons in whose possession the same shall be found," have made no such change in the law as to render necessary any alteration in the form of such warrants. It is still proper to insert in a search warrant the name of the person in whose building, &c., the complainant swears that he suspects the goods are concealed, and to order the officer to arrest such person, if the goods are found in his possession. *Stone v. Dana*, 98.

See ACTION, 2. EVIDENCE, 7. OFFICER, 4.

SELECTMEN.

Selectmen have authority, even after the opening of a town meeting, to strike from the list of voters the name of a person who is not a legal voter. *Humphrey v. Kingman*, 162.

See ACTION, 6-8. PLEADING, 3.

SENTENCE.

Where a defendant is found guilty, generally, on an indictment which charges him with several distinct offences, it is not necessary that separate sentences should be awarded: A single sentence is legal, if it does not exceed the sum of the several sentences which might be awarded

Carlton v. Commonwealth, 532. *Booth v. Commonwealth*, 535

See ATTEMPT TO ESCAPE. ERROR.

SERVICE OF WRIT

See SHERIFF. WRIT

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SET-OFF.

A writing given by a child to a father, acknowledging the receipt of an advancement, cannot be used by way of set-off in a suit by the child to recover a legacy given to him in a will afterwards made by his father, nor as evidence of the payment or ademption of such legacy.

Jones v. Richardson, 247.

See ASSUMPSIT, 3. JUDGMENT, 1. TRUSTEE PROCESS.

SHERIFF.

A sheriff is not so interested in an action of replevin brought against his deputy for property attached by him, as to authorize a coroner, under Rev. Sts. c. 14, § 97, to serve the writ of replevin on the deputy.

Browning v. Bancroft, 88.

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STUDENTS.

See Voters, 4.

SUBORNATION OF PERJURY.

1. Subornation of perjury may be proved by the testimony of one witness.
Commonwealth v. Douglass, 241.
2. Though a party, who is charged with subornation of perjury, knew that the testimony of a witness whom he called would be false, yet if he did not know that the witness would wilfully testify to a fact, knowing it to be false, he cannot be convicted of the crime charged. *Id.*
3. To constitute subornation of perjury, the party charged must procure

the commission of the perjury, by inciting, instigating or persuading the witness to commit the crime. *Ib.*

See EVIDENCE, 1.

TAXES.

See ASSUMPSIT, 2. COLLECTOR. EVIDENCE, 16. PARISH, &c.
VOTER, 1-4.

TOWN.

1. An agreement for the purchase of land for a town, made by all the members of a committee duly authorized by the town to purchase it, and put in writing and signed by part of the committee, on behalf and at the verbal request of the committee, is the written agreement of the whole committee, and binding on the town. *Haven v. City of Lowell*, 35.
2. Where an agreement, made for the purchase of land for a town, by a committee of the town, is invalid, such agreement is ratified and confirmed by a subsequent vote of the town, authorizing the committee to complete the purchase of the land by them bargained and contracted for. *Ib.*

See WARRANT, &c.

TRESPASS.

Trespas *quare clausum fregit* is the proper action for the violation of the right of possession of pews which the Rev. Sts. c. 60, § 31, declare shall be real estate. *Jackson v. Rounseville*, 127.

See COLLECTOR. WILL, 7.

TRUST AND TRUSTEE.

K., being about to purchase land that was held in trust, made a contract with the trustee for the conveyance thereof, which contract in terms recognized the trust, and provided for its execution: K. subsequently required and received from the trustee and the *cestui que trust* a joint deed of the land, under circumstances which left it doubtful whether the purpose of such deed was to discharge the land from the trust: Afterwards, in an agreement between K. and the trustee for a resale of an undivided moiety of the land to the trustee, the terms of the first contract were recited, and were not declared to have been vacated: The *cestui que trust* afterwards aided in the organization of a corporation, and in the passing of a vote authorizing the purchase of said land by the corporation, without disclosing that he regarded the land as chargeable with a trust in his favor: The land was thereupon conveyed to the corporation, the sole members of which were the trustee, the *cestui que trust*, K. and his partners, who were affected with notice, and persons holding stock for the benefit of K. or his partners. *Held*, that the recital and agreement of resale revived the trust, if it had been waived by the joint deed of sale, and confirmed it, if it had not been thereby waived. *Held also*, that the trust was not waived, as to the corporation, by the conduct of the *cestui*

que trust: but that the corporation took the land subject to the existing trust. *Wright v. Dame*, 485

See EXECUTOR, 2. 3. PARTNERSHIP. WILL, 9.

TRUSTEE PROCESS.

A. attached the goods of B., his debtor, and caused them to be sold at auction on the writ, without conforming to the provisions of the Rev. Sta. c. 90, §§ 57-61, and himself became the purchaser of the goods, and took them into his possession. *Held*, in a process of foreign attachment, in which A. was summoned as trustee of B., that he could not set off the debt due to him from B. against the value of said goods, but that he was chargeable, as trustee of B., to the amount of the value of the goods.

Allen v. Hall, 263.

See HUSBAND AND WIFE, 4. PAYMENT, 1

VARIANCE.

See EVIDENCE, 2. INDICTMENT, 2.

VOTE.

Of town. See TOWN.

VOTER.

1. Payment of a state or county tax, within two years next preceding the election of governor, &c., by one who is in other respects a qualified voter, entitles him to vote at such election, although such tax was illegally assessed upon him. *Humphrey v. Kingman*, 163.
2. Though a tax, which is assessed upon one person, is paid for him by another, without his previous authority, yet, if he recognizes the act, and repays or promises to repay the amount, on the ground that such person acted as his agent, he thereby acquires the same right to vote as if he had paid the tax with his own hand. *Ib.*
3. Where A., who was taxed for land, denied, when called on for payment, that he was rightfully taxed, and directed the collector to call on B., the owner of the land, and the collector thereupon called on B.'s wife, in the absence of B., and she paid the tax, and A. afterwards repaid her and took the receipt which the collector had given her; it was *held*, that if A. directed the collector to call on B. because the tax was wrongfully assessed on A., and if the wife of B. paid the tax, believing that B. ought to pay it, and if A. afterwards, not believing himself to be rightfully assessed, or that B. had any claim on him for the amount, repaid the amount merely for the purpose of securing a right to vote, it was not such a payment as entitled him to vote. *Ib.*
4. The mere facts, that a student, who has a domicile in one town, resides at a public institution in another town, for the sole purpose of obtaining an education, and that he has his means of support from another place, do not constitute a test of his right to vote and his liability to be taxed in the latter town. He obtains this right and incurs this liability only by a

change of domicil; and the question, whether he has changed his domicil, is to be decided by all the circumstances of the case. *Opinion*, 587.

5. Persons who have the requisite qualification as to residence, but who have been exempted from taxation, on account of their poverty two successive years before their arrival at the age of seventy years, are not entitled to vote for governor, lieutenant governor, senators and representatives, under the third article of the amendments to the constitution.

Opinion 691

See ACTION, 6-8. EVIDENCE, 16. SELECTMEN.

WAIVER.

See ACTION, 5-8. ASSUMPSIT, 3. INSOLVENT DEBTORS. TRUST AND TRUSTEE. WRIT, 1.

WARRANT FOR TOWN MEETING.

A town duly passed a vote appointing a committee to purchase certain land for the site of a market house, to make an estimate of the expense of such house, and to report at the next town meeting: The warrant for the next town meeting was, "to hear reports of committees appointed to purchase land, and furnish an estimate of the expense of a market house; to see if the town will authorize their treasurer to borrow, on the credit of the town, such sum of money as may be necessary to enable said committee to purchase the land and erect a suitable building for a market house; or act on that subject as they think proper:" At that meeting, the committee reported that they had purchased the said land, and recommended that the town should purchase an additional lot of land, adjoining that already purchased, and thus obtain a more commodious site for the market house: Whereupon the town voted, (among other things,) that said committee be authorized to purchase said additional land. *Held*, that the subject matter of this vote was so inserted in the warrant, as to give the vote full legal operation, under *St.* 1785, c. 75, § 5. *Haven v. City of Lowell*, 35.

WARRANTY.

A agreed to deliver to B., in part payment of a debt, the note of W. indorsed by two other persons, and afterwards wrote to B. this letter:—"I enclose you the note of W.'s, indorsed as proposed, which you will please pass to my credit." *Held*, that this was a warranty that the indorsements on the note enclosed in the letter were genuine.

Cookidge v. Brigham 28

See ASSUMPSIT, 4. DAMAGES, 1.

WASTE.

See EQUITY, 3.

WATERCOURSE.

See COVENANT, 1. EASEMENT. MILLS.

WHARF.

See DEED, 3. PLEADING, 1. RAIL ROAD, 2.

WILL.

1. A testator, after giving the use and improvement of all his real and personal estate to his wife during her widowhood, made the following residuary devise: "I give to my five sons all the residue and remainder of my real estate, to be equally divided among them, they to come into possession thereof when my wife's improvement ends: And if any or either of my said sons should die before they arrive to the age of twenty-one years, or should die without any legal heir of their body, then and in that case their share or shares shall descend equally to their surviving brother or brothers." *Held*, that each of the sons took an estate tail in one fifth of the land devised, with cross remainders. *Held also*, that if this clause in the will had given to the sons a fee simple, with a limitation over, by way of executory devise, then the devise over could not have taken effect, unless one or more of the sons had died before coming of age and without lawful issue. *Parker v. Parker*, 134.
2. A devise of "all the residue and remainder of my real estate" passes a fee, though no words of limitation or inheritance are added. *Ib.*
3. A devise of real estate, without words of inheritance, passes a fee, if the devisee is personally charged in the will with the payment of money to third persons. *Ib.*
4. A., owning an undivided moiety of lands and a dwellinghouse, devised to B., C. and D. each one fifth part of *all his real estate*, and to E. two fifth parts thereof, and to D. and E. each one fourth part of his dwellinghouse; without adding words of limitation or inheritance. *Held*, that D. and E. took the testator's moiety of the dwellinghouse, as a specific devise, and that B., C., D. and E. took the residue of his real estate in fee. *Allen v. Hoyt*, 324.
5. Where a testator devised one fifth part of all his real estate to S., the wife of A., and her children, A. having children at the time the devise was made, it was held that S. and her children took one fifth of the estate as tenants in common. *Ib.*
6. The will of a testator was thus: "I give, bequeath and devise to my wife the following described pieces of land" (particularly describing them): "Also all my personal estate of every kind, wheresoever it may be found, which I may be possessed of at the time of my decease, after payment is made therefrom of my just debts, funeral charges and other necessary expenses. To have and to hold the same to her, her heirs, executors, administrators and assigns, to their use and behoof forever. The other part of my real estate is to be divided as the law directs:" The debts, &c. of the testator exceeded the value of his personal property. *Held*, that the real estate, devised to the wife, was not charged with the payment of his debts, &c., and that the undeviseed real estate should first be applied to the payment of the excess of the debts, &c., over the value of the personal property. *Adams v. Brackett*, 280

7. A testator, after ordering all his debts to be paid, and giving certain legacies, devised one third part of all his estate, real and personal, of which he should 'die seized,' to C., to hold the same to her and her assigns forever; 'the same to be paid to her' by his executors, as soon after his decease, as should, in their judgment, be most for the advantage of all concerned in his estate: The remainder of his estate, real and personal, of which he should 'die seized,' he devised to his minor children in equal proportions, to hold to them and their assigns forever, after payment, by his executors, of all his debts and legacies, 'to be paid' by his executors to said children, severally, as they should come of age, or so much thereof as should remain of principal and interest, after furnishing to them the means of support and education, till they should be qualified, on account of age, 'to receive said legacies': The testator then ordered, that his executors should manage his estate and effects, and dispose of all his lands, chattels, &c., for the purposes above mentioned, at such time and in such manner, as should be most likely, in their judgment, to do justice to all his creditors, and be for the greatest advantage of all concerned in his estate; and he also directed his executors, in order to increase the proceeds of his estate, to sell the wood, growing on his land, separate from and previous to the sale of the land on which it was growing, except so much of the young wood as should, in their judgment, add to the amount of his estate, by being sold with the land. *Held*, that by the legal effect of the several provisions of the will, the executors had such a title and interest in the land of which the testator died seized, as authorized them to maintain an action of trespass *quare clausum fregit* for an illegal entry upon such land.

Dascomb v. Davis, 335.

8. Where a testator devised land of which he obtained the right of possession by a judgment on a petition filed by him for partition, pursuant to *Sts.* 1783, c. 41, and 1786, c. 51, and after notice given, to all persons interested, of the pendency of such petition, it was held that he died seized of the land, although others, who claimed title thereto, occasionally entered upon it and cut wood thereon, after the judgment of partition.

Id.

9. A testatrix devised real estate to A., her nephew, in trust for P., her niece, and to her heirs and assigns forever, the income thereof to be paid to P. during her life: P. died before the testatrix, leaving issue, an infant daughter, who survived the testatrix. *Held*, that the trust was created for the benefit of P. only, and that A. therefore took no estate under the will, but that P.'s infant daughter took the devised estate in fee, by virtue of the will and of the *Rev. Sts.* c. 62, § 24.

Paine v. Prentiss, 396.

See DOWER.

WITNESS.

1. A grantor, who conveys land with warranty to A., bounding him on a certain line, and then conveys land to B. with warranty, bounding him

on A.'s line, is a competent witness, in a suit between A. and B., to testify as to the situation of the monuments on their dividing line, at the time of his conveyances, although those monuments do not exist at the time when he testifies. *Daggett v. Shaw*, 223.

2. In an action by an indorsee against one who signed a promissory note on the back thereof, the indorser is a competent witness to prove that the defendant signed the note at the same time with the promisor whose signature was on the face of the note. *Richardson v. Lincoln*, 201.
3. Under *St.* 1839, c. 107, § 2, an executor, who is plaintiff in a suit in which he has no interest, except such as arises from his liability for costs and expenses of the suit, may be a witness in such suit, if there be first tendered to him such security for his liability for costs, as is sufficient, in the opinion of the court, to indemnify him on account thereof, and he need not also release his right to recover costs of the defendant in such suit, in order to enable him to testify. *Dascomb v. Davis*, 335.
4. The members of an association entered into for religious purposes, without any lay organization, but solely under the advice of the ministers and elders of their denomination, and who maintain public worship, are competent witnesses in a suit brought by or against such association. *Macomber v. Christian Society in Plymouth*, 155.

See PARISH, &c., 2,

WRIT.

1. Where a suit is brought against three joint contractors, and the writ is served on two only, the two, by pleading the general issue, waive their right to object to the want of service on the third.
Bartlett v. Robbins, 184.
2. By the Rev. *Sts.* c. 90, when a suit is brought against a defendant who has been an inhabitant of the State, but resides out of the State, and is not within its jurisdiction when the writ is served, and no effectual attachment of his property is made, it is necessary, in order to constitute a sufficient service of the writ, that the summons be left at his last and usual place of abode within the State. But *it seems*, that if the summons for such defendant is left with his agent or co-defendant, the court may order a new summons or notice to be issued and served, and that after a return of the service of personal notice on him, he is bound to answer to the suit. *Wright v. Oakley*, 400.
3. Where a writ of error is brought upon a judgment in a criminal case, under *St.* 1842, c. 54, the prosecuting officer of the Commonwealth is not bound to take notice and act thereon, until fourteen days after a *scire facias* to hear errors has been served upon him.

? *Christian v. Commonwealth*, 334.

See SHERIFF.

END OF VOLUME V

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